This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

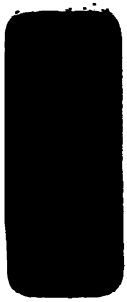
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

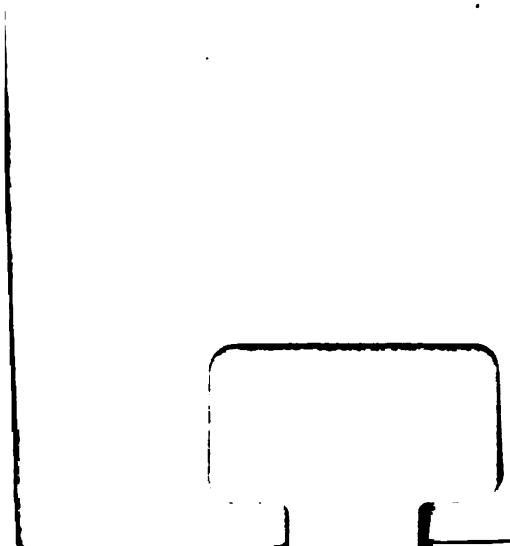
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`





REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CXIV.

CONTAINING

THE CASES ARGUED AND DETERMINED IN THE COURT OF COMMON PLEAS, AND IN THE EXCHEQUER CHAMBER, IN HILARY AND EASTER TERMS AND VACATIONS, 1865.

JAMES PARSONS, Esq.,
EDITOR.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 585 CHESTNUT STREET.
1866.

a. 55283

JUL 3 1901

Entered, according to Act of Congress, in the year 1866, by

T. & J. W. JOHNSON & CO.,

in the Clerk's Office of the District Court of the United States, for the Eastern District of Pennsylvania.

COMMON BENCH REPORTS.

New Series.

CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

HILARY AND EASTER TERMS AND VACATIONS, 1865,

BY

JOHN SCOTT, ESQ.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XVIII.

WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

JAMES PARSONS, ESQ.,

EDITOR.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1866.

Entered, according to Act of Congress, in the year 1866, by

T. & J. W. JOHNSON & CO.,

in the Clerk's Office of the District Court of the United States, for the Eastern District of Pennsylvania.

☞ The volumes of Reports to which this mark (†) is annexed have been reprinted by T. & J. W. JOHNSON & Co., with American Notes and References by Messrs. HARE and WALLACE, HENRY WHARTON, Esq., SAMUEL DICKSON, Esq., and JAMES PARSONS, Esq.

STEREOTYPED BY MEARS & DUSENBERY. PRINTED BY I. ASHMEAD.

JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir WILLIAM ERLE, Knt., Lord C. J.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.
The Hon. Sir HENRY SINGER KEATING, Knt.
The Hon. Sir MONTAGUE EDWARD SMITH, Knt.

ATTORNEY-GENERAL.

Sir ROUNDELL PALMER, Knt.

SOLICITOR-GENERAL.

Sir ROBERT PORRETT COLLIER, Knt.

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

☞ The Names of the Additional Cases are printed in *Italic*.

PAGE

B.

Baker, app. Locke, resp. . 52, 64
Barker *v.* M'Andrew . . 759
Bencraft, resp., Gaydon, app. . 11
Benesh, app., Booth, resp. : . 111
Bilbee *v.* London, Brighton, and South Coast Railway Company 584
Binder *v.* Peacock . . . 702
Blain, resp., Heelis, app. . . 90
Blain, app., Pilkington (Overseers), resp. 6
Blight *v.* Goodliffe . . . 757
Bockett, Cox *v.* . . 239, 241
Boodle, resp., Flatcher, app. . 152
Booth, resp., Benesh, app. . 111
Boraston, resp., Powell, app. . 175
Borries *v.* Hutchinson . . 445
Bosworth, resp., Steele, app. . 22
Bourne *v.* Fosbrooke . . 515
Bradley, resp., Powell, app. 65, 71
Brice, Penny *v.* . . . 393
Brighton Railway Company, Bilbee *v.* 584
Brighton Railway Company, Foy *v.* 225
Brinsley, Semenza *v.* . . 467
Bullen *v.* Sharp . . . 614

C.

Calvert *v.* Scinde Railway Company 306

PAGE

Cameron, Mersey Docks and Harbour Board Trustees v. . 867
Carpenter, resp., Comley, app. . 378
Christy, Elwood *v.* . . . 494
Clarke *v.* Watson . . . 278
Clubb *v.* Hutson . . . 414
Cobb *v.* Peacock . . . 702
Cole, resp., Oram, app. . . 1
Coles *v.* Turner . . . 736
Comley, app., Carpenter, resp. . 378
Cooper, In re 220
Cox *v.* Bockett . . 239, 241

D.

Day *v.* Peacock . . . 702
Day, app., Simpson, resp. . 680
Dowling, in re . . . 223
Drewett, resp., Roberts, app. . 48
Durant, resp., Scott, app. . . 205

E.

Eatwell, app., Richmond, resp. 364
Elwood *v.* Christy . . . 494
English and Scottish Marine Insurance Co., Fowler *v.* . . 818

F.

Falk *v.* Fletcher . . . 40
Farmer, resp., Powell, app. . 1
Farnworth *v.* Hyde . . . 8

PAGE

Fessard *v.* Mugnier . . . 286
Fielding *v.* Lee 499
Flatcher, app., Boodle, resp., . 152
Fletcher, Falk *v.* 403
Foreman, resp., Smith, app. . 144
Fosbrook, Bourne *v.* . . . 515
Fowler *v.* English and Scottish Marine Insurance Co. . . 818
Foy *v.* London, Brighton, and South Coast Railway Company 225
Freeman, app., Gainsford, resp. 185

G.

Gainsford, resp., Freeman, app. 185
Gardiner, resp., Jellicoe, app. . 860
Gaydon, app., Bencraft, resp. . 11
Goodliffe, Blight *v.* 757
Graham *v.* North Eastern Railway Company 229
Great Western Railway Co., app., Willis, resp. . . . 748
Guest, resp., Powell, app. . . 72

H.

Harney, resp., Whymper, app. . 243
Heelis, app., Blain, resp. . . 90
Hodgson *v.* Moulson . . 332
Hogg *v.* Skeen. . . . 426
Hutchinson, Borries *v.* . . 445
Hutson, Clubb *v.* . . . 414
Hyde, Farnworth *v.* . . . 835

I.

Im Thurn, Phillips *v.* . 400, 694

J.

Jellicoe, app., Gardiner, resp. . 860
Jones v. *The Mersey Docks and Harbour Board Trustees* . 867
Jones, resp., Powell, app. . 83

K.

Kilby *v.* Rochussen . . . 357
Kilby *v.* Wright . . . 272
Knatchbull, Pigrim *v.* . . 798

L.

Langmead *v.* Maple . . . 255
Langton *v.* Waring . . . 315
Leach, Swire *v.* . . . 479
Lee, Fielding *v.* . . . 499
Lee, app., Riley, resp. . . 722
Locke, resp., Baker, app. . 52, 64
London, Brighton, and South Coast Railway Company, Bilbee *v.* 584
London, Brighton, and South Coast Railway Company, Foy *v.* 225
Lyne *v.* Wyatt . . . 593

M.

M'Andrew, Barker *v.* . . 759
Maple, Langmead *v.* . . . 255
Matthey *v.* Wiseman . . 657
Memoranda.
Judges.
Resignation of Williams, J. 219
Appointment of Montague Smith, J. . . . 219
Queen's Counsel.
Webster, Milward, Brown, Bulwer, De Gex, J. Williams, Smith, Jessel, Sir T. Phillips, Giffard . 530
Serjeant
Robinson 530
Mersey Docks and Harbour Board Trustees v. *Cameron* . 867
Mersey Docks and Harbour Board Trustees, Jones v. . 867
Morgan, Rawlings *v.* . . 776
Moulson, Hodgson *v.* . . 332
Mugnier, Fessard *v.* . . 286

N.

Neill *v.* Whitworth . . . 435
Nichols, resp., Tepper, app. . 121
North Eastern Railway Company, Graham *v.* . . . 229

O.

Oldacre, Percival *v.* . . . 398
Oram, app., Cole, resp. . . 1

PAGE

P.

Pask, Scrivener *v.* 785
Peacock, Binder *v.* 702
Peacock, Cobb *v.* 702
Peacock, Day *v.* 702
Penny *v.* Brice 393
Percival *v.* Oldacre 398
Percival, resp., Roberts, app. . 36
Phillips *v.* Im Thurn . . 400, 694
Pigrim *v.* Knatchbull . . 798
Pilkington (Overseers), resp., Blain, app. 6
Poley, Prestwich *v.* 806
Powell, app., Boraston, resp. . 175
Powell, app., Bradley, resp. 65, 71
Powell, app., Farmer, resp. . 168
Powell, app., Guest, resp. . . 72
Powell, app., Jones, resp. . . 83
Prestwich *v.* Poley . . . 806

R.

Rawlings *v.* Morgan 776
Richmond, resp., Eatwell, app. 364
Riley, resp., Lee, app. . . 722
Roberts, app., Drewitt, resp. . 48
Roberts, app., Percival, resp. . 36
Rochussen, Kilby *v.* . . 357

S.

Scinde Railway Company, Calvert *v.* 306
Scott, app., Durant, resp. . . 205
Scrivener *v.* Pask . . . 785
Semenza *v.* Brinsley . . 467
Sharp, Bullen *v.* 614
Simpson, resp., Day, app. . . 680
Skeen, Hogg *v.* 426
Skilton *v.* Symonds . . . 418
Smith, app., Foreman, resp. . 144
Stacy *v.* Whitehurst . . 344
Steele, app., Bosworth, resp. . 22
Sunderland (Overseers), app., Sunderland Union (Guardians), resp. 531
Sunderland Union (Guardians), resp., Sunderland (Overseers), app. 531
Swire *v.* Leach . . . 479
Symonds, Skilton *v.* . . . 418

T

Tepper, app., Nichols, resp. . 121
Turner, Coles *v.* . . . 736

W.

Waring, Langton *v.* . . 315
Watson, Clarke *v.* . . . 278
Whitehurst, Stacy *v.* . . 344
Whitworth, Niell *v.* . . . 435
Whymper, app., Harney, resp. . 243
Willes, resp., Great Western Railway Company, app. . 748
Wiseman, Matthey *v.* . . 657
Wright, Kilby *v.* . . . 272
Wyatt, Lyne *v.* . . . 593

TABLE OF CASES CITED.

A.

PAGE

Adams *v.* Grane, 1 C. & M. 380, 3 Tyrwh. 326 . . . . . 480, 486, 493
Agnew, app., Fowler, resp., 1 Irish Com. Law Rep. 462 214
Alchin *v.* Hopkins, 1 N. C. 99, 4 M. & Scott 615 295
Allison *v.* Monkwearmouth Shore, 4 Ellis & B. 13 . 536, 543, 544, 545, 546, 569, 570, 573, 575, 576, 578, 583
Allwood *v.* Henckell, Marsh. Ins. (by Shee) 280, Park. Ins. (by Hildyard), 399 848
Anderson *v.* Royal Exchange Assurance Company, 7 East 58 852
Andrewes *v.* Elliott, 5 Ellis & B. 502 213
Andrewes *v.* Elliott, (in error), 6 Ellis & B. 338 213
Andrews *v.* Clerke, Carth. 25, Comb. 109, 1 Show. 11 673
Anonymous, Cro. Eliz. 46 . . . . . 99, 160, 107, 110
Anonymous, 1 Ventr. 265 732
Armory *v.* Delamirie, 1 Stra. 505 . . . . . 523, 525, 528
Ashby *v.* White, 2 Ld. Raym. 938, 943, 6 Mod. 41, 1 Salk. 19, 3 Salk. 17, Ld. Holt 524 17
Ashmore, app., Lees, resp., 2 C. B. 31, 1 Lutw. Reg. Cas. 337 . . . . 30, 32
Ashpitel *v.* Bryan, 32 Law J., Q. B. 91 402
Attorney-General *v.* Drapers' Company, 2 Beavan 508 32
Attorney-General *v.* Stephens, 6 De Gex, M'N. & G. 111 427
Autey, app., Topham, resp., 7 Scott N. R. 402, 5 M. & G. 1, 1 Lutw. Reg. Cas. 1 213

B.

Back *v.* Stacey, 2 Car. & P. 465 269
Badger *v.* South Yorkshire Railway and River Dun Co., 1 Ellis & Ellis 347 135
Baerselman *v.* Langlands, 34 Law J., Exch. 3 423
Bailey *v.* Bidwell, 13 M. & W. 73 433
Bailey *v.* Bryant, 1 Ellis & Ellis 340 801
Bainbridge *v.* Neilson, 10 East 329 . . . . . 828 n.
Baker *v.* Townshend, 7 Taunt. 422, J. B. Moore 120 416

PAGE
Banks *v.* Self, 5 Taunt. 234 n. 675
Baring *v.* Corrie, 2 B. & Ald. 137 . . . . . 470, 475
Barlow, Ex parte, In re Marygold, 2 De Gex, M'N. & G. 921 . . . 505
Barrow *v.* Arnaud, 1 Q. B. 604, 609 452
Barry *v.* Nesham, 3 C. B. 641 650
Batterbury *v.* Vyse, 2 Hurlst & Colt. 42 283
Baxter, app., Newman, resp., 8 Scott N. R. 1019, 7 M. & G. 198, 1 Lutw. Reg. Cas. 287 . . . . . 133, 138, 201, 203
Beeley *v.* Wingfield, 11 East 46 416
Behn *v.* Burness, 4 Best & Smith 296, 32 Law J., Q. B. 204 . . 441, 442
Bell *v.* Hayden, 9 Irish Com. L. R. 301 . . . . . 781 n.
Bell *v.* Nixon, Holt N. P. C. 423 851
Benham *v.* Broadhurst, 11 Law T. N. S. 537 275
Bennett, app., Blain, resp., 15 C. B. N. S. 518, 1 Hopw. & Ph. 35 134, 136, 138 185, 201, 203, 204, 205
Bennett *v.* Edwards, 8 B. & C. 702, 1 M. & R. 482 56
Bennett *v.* Edwards, (in error), 3 Y. & J. 458, 6 Bingh. 230, 2 M. & P. 749 56 n.
Bennett *v.* Farnell, 1 Campb. 130, 133 694
Bentley *v.* Dawes, 9 Exch. 666 302
Betts *v.* De Vitre, 34 Law J., Chan. 289 496
Bevil's Case, 4 Co. Rep. 10 a. 103
Bingham *v.* Allport, 1 N. & M. 398 810
Birch and Bell, In re, 6 Scott 195, 4 N. C. 394 221
Birch, app., Edwards, resp., 5 C. B. 45, 2 Lutw. Reg. Cas. 37 . . 118, 120
Bird *v.* Peagrum, 13 C. B. 639 521
Bishop, app., Smedley, resp., 2 C. B. 89, 1 Lutw. Reg. Cas. 384 . . 155, 159
Blakey *v.* Dixon, 2 Bos. & P. 321 158
Bligh *v.* Brent, 2 Y. & C. Eq. Exch. 268 . . . . . 137, 138, 201
Bond *v.* Pittard, 3 M. & Selw. 357 650
Booth *v.* Gair, 15 C. B. N. S. 294 853
Borries *v.* Hutchinson, 18 C. B. N. S. 445 440
Boscawen and Herle *v.* CooK, 1 Mod. 223 104
Boyd *v.* Hind, 1 Hurlst. & N. 938 295
Bradshaw *v.* Beard, 12 C. B. N. S. 344 521
Bristow *v.* Whitmore, 9 House of Lords Cases 391 . . . . 792, 796
Brotherston *v.* Barber, 5 M. & Selw. 418 833
Brown *v.* Arundell, 10 C. B. 54 486
Brown *v.* Shevill, 2 Ad. & E. 138, N. & M. 277 . . . . 486, 487, 493
Brown *v.* Smith, 1 Dow 349 830
Bruce *v.* Nicolopulo, 11 Exch. 129 . . 765, 766, 767, 768, 769 n., 770, 773
Buckley *v.* Gross, 32 Law J., Q. B. 129 . . . . . 523, 528
Burgh *v.* Legge, 5 M. & W. 418 360
Burton, app., Blake, resp., 11 C. B. 47, 2 Lutw. Reg. Cas. 197 . 212 n., 213 n.
Burton, app., Brooks, resp., 11 C. B. 41, 2 Lutw. Reg. Cas. 197 . . 212 n.
Bushell, app., Eastes, resp., 11 C. B. N. S. 106 51
Butler *v.* Ablewhite, 6 C. B. N. S. 740 . . 798, 800, 801, 802, 803, 804, 805
Butt *v.* Great Western Railway Company, 11 C. B. 140 769
Byrne *v.* Boadle, 2 Hurlst. & Colt. 722 588

C.

PAGE

Cambridge *v.* Anderton, 2 B. & C. 691, 4 D. & R. 203 . . . 841, 842, 845
Cannan *v.* Meaburn, 1 Bingh. 243, 8 J. B. Moore 127 850
Cannan *v.* Wood, 2 M. & W. 465 331
Carne *v.* Brice, 7 M. & W. 183 . . . . . 519, 521
Carr *v.* Hinchliff, 4 B. & C. 551, 7 D. & R. 42 . . . . . 472, 475, 477
Caunter, app., Addams, resp., 15 C. B. N. S. 512, 1 Hopw. & Ph. 60 . . 58
Cawer *v.* James, Bull. N. P. 150 395
Chapman, app., Robinson, resp., 1 Ellis & Ellis 25 . . . . . 216 n.
Chapman *v.* Parrott, 14 C. B. N. S. 74 . . . . . 812, 813
Clapham *v.* Atkinson, 4 Best & Smith 722, 730 . . . . . 302, 606
Clapham *v.* Atkinson, (in error), 4 Best & Smith 730 606
Clarke, app., Beaton, resp., 5 C. B. 76 . . . . . 213 n.
Clarke, app., Bury St. Edmunds (Overseers), resp. 1 C. B. N. S. 23, 33 . 71 n.
Clayton's Case, 1 Meriv. 572 88
Clifford *v.* Burton, 1 Bingh. 199, 8 J. B. Moore 16 756
Clow *v.* Brogden, 2 M. & G. 39, 2 Scott N. R. 302 779
Clun, In re, Ex parte Morrison, 32 Law J., Bankruptcy 47 421
Colbeck, In re, Buck, B. C. 48 646
Coles, app., Dickenson, resp., 16 C. B. N. S. 604 252
Collins *v.* Blantern, 2 Wils. 341, 347 415
Collis *v.* Emett, 1 H. Bl. 313 695
Colvill, app., Lewis, resp., 2 C. B. 60, 1 Lutw. Reg. Cas. 380 n. . . . 213 n.
Cook *v.* Herle, 2 Mod. 138 104
Cook, app., Humber, resp., 11 C. B. N. S. 33, K. & G. 413 . . 173, 175, 178
Coppock *v.* Bower, 4 M. & W. 361 417
Cordery *v.* Colvin, 14 C. B. N. S. 374 . . . . . 362, 363
Cornfoot *v.* Fowke, 6 M. & W. 373 794
Cornman *v.* Eastern Counties Railway Company, 4 Hurlst. & N. 781 . . 227
Cotton *v.* Wood, 8 C. B. N. S. 568 . . . . . 227, 592
Courtenay *v.* Wagstaff, 16 C. B. N. S. 110 651
Cox *v.* Burbidge, 13 C. B. N. S. 430 . . . . . 725, 729, 732, 733
Cranley *v.* Hillary, 2 M. & Selw. 120 . . . . . 295, 303
Croucher, app., Browne, resp., 2 C. B. 97, 1 Lutw. Reg. Cas. 388 . . 15
Crow *v.* Falk, 8 Q. B. 467 . . . 765, 766, 767, 768, 769 n., 770, 772, 775
Crowther, app., Bradney, resp., 15 C. B. N. S. 536, 1 Hopw. & Ph. 63 . 4
Culling *v.* Tuffnall, Bul. N. P. 34 173
Cumber *v.* Wane, 1 Stra. 426, 1 Smith's Leading Cases, 5th ed. 294 . . 294
Curlewis *v.* Mornington (Earl), 7 Ellis & B. 283 . . . . . 396, 397

D.

Dalton *v.* South Eastern Railway Company, 4 C. B. N. S. 296 . . . 440
Daniels *v.* Gladstone (not reported) 420, 422
Davies *v.* Underwood, 2 Hurlst. & N. 570 . . . . . 780, 781
Davis, app., Waddington, resp., 7 M. & G. 37, 8 Scott N. R. 807, 1 Lutw. Reg. Cas. 159 . . . . . 28, 32
De Haber *v.* Portugal (Queen of), 17 Q. B. 171 676
Dell *v.* King, 2 Hurlst. & Colt. 84 . . . . . 604, 610, 613, 614

PAGE

Dewhurst, app., Fielden, resp., 7 M. & G. 182, 8 Scott N. R. 1013, 1 Lutw. Reg. Cas. 274 75
Dingwall *v.* Edwards, 33 Law J., Q. B. 161 . . . . . 276, 277, 610
Dixon, In re, 4 C. B. 631 . . . . . 225 n.
Doe d. Worcester Schools Trustees *v.* Rowlands, 9 C. & P. 734 . . . 780
Dorsett *v.* Aspdin, 11 C. B. 651 . . . . . 111 n.
Dowdell *v.* Australian Royal Mail Steam Navigation Co., 3 Ellis & B. 902 . 312
Drage *v.* Ibberson, 2 Esp. N. P. C. 643 . . . . . 414, 416, 417
Dunlop *v.* Higgins, 1 House of Lords Cases 381 452
Dunston *v.* Paterson, 5 C. B. N. S. 267 . . . . . 76, 79

E.

Easton *v.* Alce, 7 Hurlst. & N. 452 . . . . . 552, 567
Eatwell, app., Richmond, resp., 18 C. B. N. S. 364 . . . 386, 391, 393
Edgecombe *v.* Rodd, 5 East. 294 417
Edwards *v.* Hall, 6 De Gex, M'N. & G. 74 201
Eidsforth, app., Farrer, resp., 4 C. B. 9, 1 Lutw. Reg. Cas. 517 . . . 3
Elmore *v.* Stone, 1 Taunt. 458 331
Elstob *v.* Thorowgood, 1 Ld. Raym. 283 395
Elwes *v.* Maw, 3 East 38 171
Evans *v.* Powis, 1 Exch. 601 . . . . . 295, 296
Evans *v.* Watson, 3 C. B. 327 . . . . . 311, 314
Eyre *v.* Archer, 6 C. B. 638 . . . . . 601, 610

F.

Falkner *v.* Ritchie, 2 M. & Selw. 290 830
Fallowes *v.* Taylor, 7 T. R. 475 417
Fanny and Elmira, Edwards Adm. R. 117 850
Fawcett *v.* York and North Midland Railway Company, 16 Q. B. 610 . 590
Feise *v.* Wray, 3 East 93 412
Fenton *v.* Logan, 9 Bingh. 676, 3 M. & Scott, 82 486
Findon *v.* McLaren, 6 Q. B. 891 486
Firth *v.* Thrush, 8 B. & C. 387, 2 M. & R. 359 363
Fish *v.* Kempton, 7 C. B. 694 . . . . . 471, 474
Fisher *v.* Lane, 3 Wils. 297 673
Fleming *v.* Smith, 1 House of Lords Cases 513 844
Ford, app., Smedley, resp., 12 C. B. 622, 2 Lutw. Reg. Cas. 203 . . . 155
Foster's Case, 2 Peck. 105 133
Foster *v.* Christie, 11 East 205 832
Fowler *v.* English and Scottish Marine Insurance Co., 18 C. B. N. S. 818 . 846 n.
Fox, app., Davies, resp., 6 C. B. 11, 2 Lutw. Reg. Cas. 97 . . 56, 61, 63, 88
Francis *v.* Wyatt, 3 Burr. 1498 486
Fray *v.* Voules, 1 Ellis & Ellis 839, 847 . . . . . 809, 811, 812
Freeman, app., Gainsford, resp., 11 C. B. N. S. 68, K. & G. 448 . 29, 33, 35, 36, 38, 39, 40, 41, 42, 44, 45, 46, 47
Freeman, app., Read, resp., 30 Law J., M. C. 123 214
Freshney *v.* Carrick, 1 Hurlst. & N. 653 . . . . . 510, 513, 514
Fyson *v.* Chambers, 9 M. & W. 460 . . . . . 523, 526

G.

PAGE

Gadsby, app., Barrow, resp., 8 Scott N. R. 799, 7 M. & G. 21, 1 Lutw. Reg. Cas. 142 146
Gale, app., Chubb, resp., 4 C. B. 41, 1 Lutw. Reg. Cas. 544 . . . 15, 18
Gallini *v.* Laborie, 5 T. R. 242 . . . . . 686, 689
Gambart *v.* Ball, 14 C. B. N. S. 306 690
Gardner *v.* Chapman, 8 C. B. N. S. 317 609
Gardner *v.* Salvador, 1 M. & Rob. 116, 117 851
Garland, Ex parte, 10 Ves. 110 . . . . . 646, 652
Garrard *v.* Woolner, 8 Bingh. 258, 1 M. & Scott 327 295
Garrod *v.* Simpson, 3 Hurlst. & Colt. 395 610
Garth *v.* Howard, 8 Bingh. 451, 1 M. & Scott 628 756
George *v.* Clagett, 7 T. R. 359, 2 Smith's L. C. 5th ed. 108 . 470, 471, 472, 473 476, 477, 478
Gether *v.* Capper, 15 C. B. 696 . . . . . 774 n.
Gibson *v.* Hunter, 2 H. Bl. 187, 288 695
Gibson *v.* Ireson, 3 Q. B. 39 . . . . . 483, 484
Gibson *v.* Minet, 1 H. Bl. 569, 2 Bro. P. C. 48 . . . . . 694, 695
Gildart *v.* Gladstone, 11 East 675 365
Giles *v.* Nathan, 5 Taunt. 558 . . . . . 673 n.
Gilman *v.* Elton, 3 Brod. & B. 75, 6 J. B. Moore 243 . . . . . 482, 485
Gisbourn *v.* Hurst, 1 Salk. 249 . . . . . 482, 487
Godden, Ex parte, In re Shettle, 32 Law J., Bankruptcy 37, 1 De Gex, Jones, & S. 260 421
Goode *v.* Cheeseman, 2 B. & Ad. 328 295
Goodman *v.* Harvey, 4 Ad. & E. 870, 6 N. & M. 372 427
Gorslett *v.* Harris, 29 Law Times 75 . . . . . 802 n.
Goss *v.* Withers, 2 Burr. 694 . . . . . 828 n.
Grafton *v.* Eastern Counties Railway Company, 8 Exch. 699 . . . 281
Graham *v.* Furber, 14 C. B. 134, 156 509
Graham *v.* Londonderry (Lord), 3 Atk. 393 . . . . . 522 n.
Grant *v.* Hawkes, Chitty on Bills, 10th ed. 42 . . . . . 429, 434
Great Indian Peninsula Railway Co. *v.* Saunders, 1 Best & Smith 41 . 838, 853
Great Indian Peninsula Railway Co. *v.* Saunders, (in error), 2 Best & Smith 266 . . . . . 838, 853
Great Northern Railway Company *v.* Harrison, 12 C. B. 576 . . . 283
Griffin *v.* Colver, 2 Smith's New York R. 489, 494 451
Griggs *v.* Cocks, 4 Simons 438 . . . . . 88 n.
Grout *v.* Enthoven, 1 Exch. 382 434

H.

Hadley *v.* Baxendale, 9 Exch. 341 . . . . . 440, 449, 450, 460, 461
Haldane *v.* Johnson, 8 Exch. 689 304
Halford *v.* Bailey, 13 Q. B. 426 355
Hall, In re, 19 C. B. N. S. 222
Hall *v.* Wood, 14 East 243 n. 88
Hamilton *v.* Mendes, 2 Burr. 1198 . . . . . 828, 832, 833
Hammack *v.* White, 14 C. B. N. S. 588, 494 589
Hamper, Ex parte, 17 Ves. 404 646

PAGE
Harrington *v.* Macmorris, 5 Taunt. 228, 1 Marsh. 33 675
Harris *v.* Holler, 12 Law J., Q. B. 62 . . . . . 240, 241
Harrison *v.* Great Northern Railway Company, 11 C. B. 815 . . . 283
Hartfield *v.* Rotherfield, 17 Q. B. 746, 21 Law J., M. C. 65 74
Harvey *v.* Towers, 6 Exch. 656 433
Harwood, in re, 7 Law T. N. S. 171 422
Hayden, app., Twerton (Overseers), resp., 4 C. B. 1, 1 Lutw. Reg. Cas. 510 91, 102, 104, 106
Haydon, app., Taylor, resp., 33 Law J., M. C. 30 . . . 249, 252, 253
Hazard *v.* Mare, 6 Hurlst. & N. 434 295
Heartley, app., Banks, resp., 5 C. B. N. S. 40, K. & G. 219 . . 28, 29, 36, 40, 42, 44, 45, 46, 47
Heath, app., Haynes, resp., 3 C. B. N. S. 389, K. & G. 99 31
Hellawell *v.* Eastwood, 6 Exch. 295 171
Herbert *v.* Sayer, 5 Q. B. 965 523
Heslop *v.* Baker, 8 Exch. 411 . . . . . 505, 506, 512
Hickman *v.* Cox, 18 C. B. 617 648
Hickman *v.* Cox, (in error), 3 C. B. N. S. 523 649
Hickman *v.* Cox, (Dom. Proc.), 9 C. B. N. S. 47, 8 House of Lords Cases 268 649, 651, 654
Hicks *v.* Beaufort (Duke), 5 Scott 598, 4 N. C. 229 359
Hidson *v.* Barclay, 3 Hurlst. & Colt. 9 . . . . . 604, 610
Hidson *v.* Barclay, (in error), 3 Hurlst. & Colt. 361 . . . 604, 610, 613
Higginbottom *v.* Perkins, 8 Taunt. 795 365
Hoare *v.* Cazenove, 16 East 391 . . . . . 696 n.
Hodgson *v.* Blakiston, Marsh. Ins. (by Shee) 281 n., Park Ins. (by Hildyard) 400 (*k*) 848
Hodsden *v.* Harridge, 2 Saund. 64 (*a*) 396
Hoey *v.* Felton, 11 C. B. N. S. 142 440
Holdsworth *v.* Wise, 7 B. & C. 794, 1 M. & R. 673 . . . . 828 n., 830
Holland *v.* Fox, 3 Ellis & B. 977 . . . . . 494, 495
Holroyd *v.* Marshall, 33 Law J., Chan. 193 325
Hopkins *v.* Tanqueray, 15 C. B. 130 . . . . . 398, 399
Howells, app., Wynne, resp., 15 C. B. N. S. 3 . . . . . 351 n.
Howes *v.* Barber, 18 Q. B. 588 311
Hunt *v.* Royal Exchange Assurance Company, 5 M. & Selw. 56, 57 . . 842
Hutchinson, Ex parte, 5 C. B. 499 222

I.

Idle *v.* Royal Exchange Assurance Co., 8 Taunt. 755, 3 J. B. Moore 115 842, 850
Ipstones Park Iron Ore Company *v.* Pattinson, 2 Hurlst. & Colt. 823, 33 Law J., Exch. 193 . . . . . 301 n., 604

J.

Johnson *v.* Ogilby, 3 P. Wms. 277, 279 415
Johnson *v.* Stear, 15 C. B. N. S. 330 . . . . . 490, 492
Johnson *v.* Wyatt, 33 Law J., Chan. 394 . . . . . 267, 268
Jonassohn *v.* Young, 32 Law J., Q. B. 385 441

PAGE

Jones, In re, 2 Ad. & E. 436 75
Jones v. Corbett, 2 Q. B. 828 434
Jones v. Smith, 1 Hare 55 427
Josling v. Irvine, 6 Hurlst. & N. 512 454
Joule v. Jackson, 7 M. & W. 450 . . . . . 485, 486, 488

K.

Kearsley v. Cole, 16 M. & W. 136 294
Keir v. Leeman, 6 Q. B. 308 . . . . . 414, 417
Kerr v. Haynes, 29 Law J., Q. B. 70 . . . . . 800, 802
Key v. Cotesworth, 7 Exch. 595 411
Keys v. Elkins, 33 Law J., Q. B. 25 . . . . . 300, 304
Kilshaw v. Jukes, 32 Law J., Q. B. 216 652
King v. Walker, 3 Hurlst. & Colt. 209 . . . . . 842, 857
Kingston (Duchess's) Case, 2 Smith's Leading Cases, 5th ed. 669 . . 261
Kinsey v. Heyward, 1 Ld. Raym. 432, 1 Lutw. 260 . . . . 395, 396
Knight v. Faith, 15 Q. B. 649 . . . . . 838, 843, 850, 856, 857
Knowles and Holden, In re, 24 Law J., Exch. 223 213
Konig v. Bayard, 1 Peters (New York) R. 250 . . . . . 697 n.

L.

Labouchere v. Tupper, 11 Moore's P. C. 198, 221 651
Lambert, Ex parte, 13 Ves. 179 . . . . . 698 n.
Lancaster v. Eve, 5 C. B. N. S. 717 . . . . . 135, 139
Lee v. Simpson, 3 C. B. 871 689
Legg v. Cheesebrough, 5 C. B. N. S. 741 . . 601, 604, 608, 609, 610, 613, 614
Leigh v. Pendlebury, 15 C. B. N. S. 819 . . . . 419, 744, 745, 747
London Dock Company v. Sinnot, 8 Ellis & B. 347 304
Lyall v. Edwards, 6 Hurlst. & N. 337 610

M.

Maanss v. Henderson, 1 East 335 . . . . . 471, 472
Macdougall v. Paterson, 11 C. B. 755 . . . . . 800, 803, 804
Macnamara v. Vincent, 2 Irish Ch. R. 481 . . . . . 781 n.
Macnaught v. Russell, 1 Hurlst. & N. 611 . . . . . 603, 604, 609
Mann, Ex parte, 7 Scott 142, 5 N. C. 226 . . . . . 221, 222
Marfell v. South Wales Railway Company, 8 C. B. N. S. 525 . . . 590
Marriott v. Colton, 2 Carr. & K. 553 781
Martin v. Reid, 11 C. B. N. S. 730 . . . . . 324, 330
Martin v. Roe, 7 Ellis & B. 237 173
Marygold, In re, Ex parte Barlow, 2 De Gex, M'N. & G. 921 . . . 505
Masterton v. Brooklyn (Mayor, &c.,) 7 Hill's New York R. 61 . . . 457
Matthews v. Phillips, 2 Salk. 425 395
Matthias v. Mesnard, 2 C. & P. 353 486
Mayfield v. Wadsley, 3 B. & C. 357, 362, 5 D. & R. 224 . . . . 88 n.
Mertens v. Winnington, 1 Esp. N. P. C. 113 . . . . . 697 n.
Messenger v. Clarke, 5 Exch. 388 519

PAGE
Milner v. Field, 5 Exch. 829 . . . . . 281, 283
Minet v. Gibson, 3 T. R. 481 695
Mogg v. Baker, 3 M. & W. 195 . . . . . 325, 327, 328
Molony v. Kennedy, 10 Simons 254 521
Moon v. Whitney Union (Guardians), 5 Scott 1, 3 N. C. 814 . 792, 793, 797
Moore v. Campbell, 10 Exch. 323 439
Moore v. Clementson, 2 Campb. 22 . . . . . 471, 472
Morgan, app., Edwards, resp., 5 Hurlst. & N. 415 . . . . . 216 n.
Morgan v. Knight, 15 C. B. N. S. 669 . . . . . 523 n.
Morrison, Ex parte, In re Clun, 32 Law J., Bankruptcy 47 421
Moss v. Smith, 9 C. B. 94 . . . . . 840, 842
Murray, app., Thorniley, resp., 2 C. B. 217, 1 Lutw. Reg. Cas. 496 . 91, 101, 104, 108, 109
Musgrave v. Drake, 5 Q. B. 185, Dav. & Mer. 347 426, 427, 428, 430, 431, 432, 433, 434
Muspratt v. Gregory, 1 M. & W. 633, Tyrwh. & G. 1086 483, 484, 485, 487, 488
Muspratt v. Gregory, (in error), 3 M. & W. 677 . . . 483 n., 485, 487, 488
Mutford v. Walcot, 1 Ld. Raym. 574 . . . . . 696 n.
Myers v. Perigal, 11 C. B. 90, 16 Sim. 533, 2 De Gex, M'N. & G. 599 200, 201, 203

N.

Nathan v. Giles, 1 Marsh. 226 . . . . . 673 n.
Naylor v. Taylor, 9 B. & C. 718, 4 M. & R. 526 . . . . . 828 n.
Nerot v. Wallace, 3 T. R. 17 417
Nettleton, app., Burrell, resp., 8 Scott N. R. 738, 7 M. & G. 35, 1 Lutw. Reg. Cas. 157 . . . . . 212 n.
Newton, app., Moberly (Overseers), resp., 2 C. B. 203, 1 Lutw. Reg. Cas. 335 . . . . . 213 n.
Nias v. Davis, 4 C. B. 444 . . . . . 76, 79, 81
Nicholson v. Revill, 4 Ad. & E. 675, 6 N. & M. 192 294
Nixon v. Denham, 1 Irish Law Rep. 100 780
Norton, app., Salisbury (Town Clerk), resp., 4 C. B. 32, 1 Lutw. Reg. Cas. 538 . . . . . 213 n.
Norwood v. Dresser, 14 C. B. N. S. 574 475
Norwood v. Dresser, (in error), 17 C. B. N. S. 466 475

O.

Oakeley v. Ooddeen, Guild. C. P., Nov. 1861 427
Osbond, app., Meadows, resp., 13 C. B. N. S. 10 . . . . . 350 n.

P.

Parker v. Smith, 5 Car. & P. 438 269
Parnaby v. Lancaster Canal Company, 11 Ad. & E. 223, 3 P. & D. 162, 1 Railway Cases 696 . . . . . 236, 237
Parry v. Aberdein, 9 B. & C. 411, 4 M. & R. 343 840
Parsons v. Gingell, 4 C. B. 545 488
Patterson v. Ritchie, 4 M. & Selw. 393 . . . . . 821 n.
Pawley v. Turnbull, 7 Jurist N. S. 792 283

PAGE
Payler v. Homersham, 4 M. & Selw. 423 . . . . . 294, 609
Peacock, app., The Queen, resp., 4 C. B. N. S. 264 . . . . . 216 n.
Pearson v. Turner, 16 C. B. 157 241
Peele v. Merchants' Insurance Company, 3 Mason's Rep. 27 . . . 827
Pennell v. Stephens, 7 C. B. 987 810
Pisey's Case, F. & F. 271 . . . . . 75, 76
Platt v. Greene, 2 Dowl. P. C. 216 311
Points, app., Attwood, resp., 6 C. B. 33, 2 Lutw. Reg. Cas. 117 . . . 57, 58, 63
Poole v. Longueville, 2 Wms. Saund. 29 *a* 485
Portman v. Middleton, 4 C. B. N. S. 322 459
Potter v. Rayworth, 13 East 417 . . . . . 359, 363
Powell, app., Farmer, resp., 18 C. B. N. S. 168 177
Powell, app., Price, resp., 4 C. B. 105, 1 Lutw. Reg. Cas. 586 . . . 148 n.
Powell v. Salisbury, 2 Y. & J. 391 732
Prentice's Case, F. & F. 273 . . . . . 75, 76
Price v. Barker, 4 Ellis & B. 760 . . . . . 293, 304
Pring, app., Eestcourt, resp., 4 C. B. 71, 1 Lutw. Reg. Cas. 505 . 212 n., 213 n.
Pringle v. Wernham, 7 Car. & P. 377 269
Purchell v. Salter, 1 Q. B. 197, 1 Gale & D. 682 . . . . . 469, 472

Q.

Quartermaine v. Bittleston, 13 C. B. 133 . . . . 505, 509, 512, 513

R.

Rabey v. Gilbert, 6 Hurlst. & N. 536 . . . . . 359, 363
Rabone v. Williams, 4 T. R. 360 (*a*) 471
Randall v. Raper, Ellis, B. & Ellis 84 . . . . . 449, 454, 464
Ranger v. Great Western Railway Company, 5 House of Lords Cases 72 . 281
Raphael v. Davis, 11 Law T. N. S. 539 275
Rawlins, app., West Derby (Overseers), resp., 2 C. B. 77, 1 Lutw. Reg. Cas. 373 . . . . . 213 n.
Read v. Burley, Cro. Eliz. 549, 596 487
Read v. Edwards, 17 C. B. N. S. 245 731
Reay v. Richardson, C. M. & R. 422 295
Reay v. White, 3 Tyrwh. 596, 1 C. & M. 748 295
Reeves v. Capper, 5 N. C. 136, 6 Scott 877 324
Regina v. Capel, 12 Ad. & E. 382, 412, 4 P. & D. 87 548
Regina v. Hallifax (Inhabitants), 12 Q. B. 111, 17 Law J., M. C. 158 . 74
Regina v. Hampshire (Justices), 32 Law J., M. C. 46 215
Regina v. Harrow-on-the-Hill (Inhabitants), 17 Law J., M. C. 148 . . 74
Regina v. Hartfield (Overseers), 21 Law J., M. C. 65, 17 Q. B. 746 . . 74
Regina v. Holbeck (Overseers), 16 Q. B. 404 . . . . . 78, 79
Regina v. Potterhanworth (Inhabitants), 28 Law J., M. C. 56 . . . 74
Regina v. Pratt, Dears. & P. C. C. 502, 24 Law J., M. C. 113 . . . 350
Regina v. Rochester (Mayor, &c.), 7 Ellis & B. 910 . . . . 215, 218
Regina v. Rochester (Mayor, &c.), (in error), 1 Ellis, B. & E. 1024 . 215, 218
Regina v. Ruscoe, 8 Ad. & E. 386, 3 N. & P. 428 . . . . . 369, 373
Regina v. Salford (Inhabitants), 12 Q. B. 106, 17 Law J., M. C. 170 . . 74

PAGE

Regina v. Scotton, 5 Q. B. 493 350
Regina v. Shrewsbury and Hereford Railway Company, 25 L. T. 65 . . 215
Regina v. Thurlstone, 1 Ellis & Ellis 502, 28 Law J., M. C. 106 . . 549, 579
Regina v. Watts, 7 Ad. & E. 461, 2 N. & P. 367 . . . . 57, 58, 60, 63
Regina v. Williams, 23 Law T. 76 549
Regina v. Yarborough (Earl), 12 Ad. & E. 416, 3 P. & D. 491 . . . 61
Reimer v. Ringrose, 6 Exch. 263 . . . . . 841, 855
Rex v. Bradford, 4 M. & Selw. 317 541
Rex v. Folly, 1 Bott P. L. 86 (6th ed. by Pratt 62) 61, 63
Rex v. George, 6 Ad. & E. 305, 1 N. & P. 451 87
Rex v. Handy, 6 T. R. 286 . . . . . 686, 689
Rex v. Hogg, Cald. 266, 1 T. R. 721 . . . . . 542 n.
Rex v. Longthorpe (Inhabitants), 6 T. R. 377 170
Rex v. Mitchell, 10 East 511 . . . . . 77, 78, 81
Rex v. Otley (Inhabitants), 1 B. & Ad. 161 173
Rex v. St. Nicholas, Gloucester, Cald. 262 . . . . . 542 n.
Rex v. St. Pancras (Churchwardens), 1 Ad. & E. 80, 3 N. & M. 425 . . 149
Rex v. Stratford-upon-Avon (Mayor, &c.), 14 East 348 . . . . 138 n.
Reynolds v. Harris, 3 C. B. N. S. 267 314
Rhodes v. Smethurst, 4 M. & W. 42 . . . . . 396, 397
Rhodes v. Smethurst, (in error), 6 M. & W. 351 . . . . . 396, 397
Richardson, Ex parte, 3 Madd. 138 652
Ringham v. Clements, 12 Q. B. 260 522
Ritchie v. Atkinson, 13 East 295 441
Roberthon v. Norroy, King-at-Arms, Dyer 83 a. . . . . 672 n.
Roberts v. Brett, 6 C. B. N. S. 611 302
Robertson v. Clarke, 1 Bingh. 445, 8 J. B. Moore 622 850
Rogers, app., Lewis, resp., 7 C. B. N. S. 29 . . . . . 157 n., 159
Rooth v. Wilson, 1 B. & A. 59 732
Rosetto v. Gurney, 11 C. B. 176 . . . . . 839, 841, 855
Rosling v. Muggeridge, 16 M. & W. 181 295
Rotch v. Edie, 6 T. R. 413 831
Rothschild v. Currie, 1 Q. B. 43 304
Routh v. Macmillan, 2 Hurlst. & Colt. 750 795
Roux v. Salvador, 3 N. C. 266, 4 Scott 1 . . . . 840, 845, 856, 857, 858
Russell v. Briant, 8 C. B. 836 690
Russell v. Smith, 12 Q. B. 217 . . . . . 689, 690

S.

Sanderson v. Collman, 4 M. & G. 209, 4 Scott N. R. 638 402
Scott v. Liverpool (Corporation), 1 Giffard 216 280
Scott v. London Dock Company, 34 Law J., Exch. 17 588
Sheddon, app., Butt, resp., 11 C. B. 27 . . . . . 111 n.
Sherren v. Harrison, 25 Law Times 79 . . . . . 791, 792
Shettle, In re, Ex parte Godden, 32 Law J., Bankruptcy 37, 1 De Gex, Jones & S. 260 421
Shipton v. Casson, 5 B. & C. 378, 8 D. & R. 130 295
Simons v. Johnson, 3 B. & Ad. 175 610

PAGE
Simpson v. Hartopp, Willes, 512, 1 Smith's L. C. 368, 373 . 480, 484, 487, 493
Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168 . . . . 28, 31, 36, 37, 38, 39, 40, 41, 42, 46, 47, 213 n.
Sims v. Bond, 5 B. & Ad. 389, 393 470
Simson v. Ingham, 2 B. & C. 65, 3 D. & R. 249 . . . . . 88 n.
Skingley v. Surridge, 11 M. & W. 503 58
Smart v. Sandars, 3 C. B. 399 471
Smeed v. Fourd, 1 Ellis & Ellis 602 457
Smith, Ex parte, In re Wyatt, 12 Q. B. 692 . . . . . 604, 610
Smith v. Braine, 16 Q. B. 244 429
Smith v. Doe d. Jersey, 2 Brod. & B. 599 . . . . . 102, 108 n.
Smith v. Martin, 9 M. & W. 304 433
Smith v. Peat, 9 Exch. 161 779
Smith v. Robertson, 2 Dow 474 828
Solly v. Forbes, 2 Brod. & B. 38, 4 J. B. Moore 448 . . . . 293, 294
Somes v. Sugrue, 4 C. & P. 276 842
Spencer's Case, 6 Co. Rep. 10 b. 395
Spitzer v. Chaffers, 14 C. B. N. S. 686 . . . . . 609, 610
Spyer, Ex parte, Re Josephs, 32 Law J., Bankruptcy 62 745
Squire v. Ford, 9 Hare 47 294
Staley v. Castleton (Overseers), 33 Law J., M. C. 178 . . . . 548, 582
Star v. Rookesby, 1 Salk. 335 732
Stewart v. Steele, 5 Scott N. R. 927 863
Stockton and Darlington Railway Company v. Barrett, 5 Scott N. R. 803, 2 M. & G. 134 365
Stockton and Darlington Railway Company v. Barrett, (in error), 8 Scott N. R. 641, 3 M. & G. 956 365
Stourbridge Canal Company v. Wheeley, 2 B. & Ad. 792 365
Strick v. De Mattos, 33 Law J., Exch. 276 . . . . . 745, 746
Stucley v. Baily, 31 Law J., Exch. 483, 1 Hurlst. & Colt. 405 . . . 796
Sutton v. Buck, 2 Taunt. 302 523
Swaine v. Great Northern Railway Company, 33 Law J., Chan. 399 . . 267
Swinfen v. Chelmsford (Lord), 5 Hurlst. & N. 890, 922 809
Swinfen v. Swinfen, 18 C. B. 485 . . . . . 811, 814, 816
Swinfen v. Swinfen, 1 C. B. N. S. 364 . . . . . 811, 814, 816
Swinfen v. Swinfen, 27 Law J., Ch. 35 . . . . 808, 810, 811, 814, 816
Swinfen v. Swinfen, 2 De Gex & Jones 381, 27 Law J., Ch. 491 808, 811, 814, 816
Swinfen v. Swinfen, 28 Law J., Ch. 849 . . . . . 811, 814, 816
Syred, app., Carruthers, resp., Ellis, B. & E. 469 . . . . . 216 n.

T.

Tarrabochia v. Hickie, 1 Hurlst. & N. 183 441
Tatlock v. Harris, 3 T. R. 174 695
Taylor, app., Hickes, resp., 12 C. B. N. S. 152 250
Theed v. Starkey, 8 Mod. 314 . . . . . 563, 580
Thomas v. Harris, 27 Law J., Exch. 353 811
Thompson v. Lack, 3 C. B. 540 294
Thompson v. Mashiter, 8 J. B. Moore 254, 1 Bingh. 283 482, 486, 487, 490, 493

PAGE

Thornely *v.* Hebson, 2 B. & Ald. 513 830
Toms, app., Cuming, resp., 7 M. & G. 88, 8 Scott N. R. 910, 1 Lutw. Reg. Cas. 200 4
Tudball, app., Bristol (Town-Clerk), resp., 5 M. & G. 5, 7 Scott N. R. 486, 1 Lutw. Reg. Cas. 7 117
Tuft's Case, Leach, Cro. Law 296 696
Tugman *v.* Hopkins, 4 M. & G. 389, 5 Scott N. R. 464 519
Tunno *v.* Edwards, 12 East 488 848
Turner *v.* Liverpool Docks (Trustees), 6 Exch. 543 411

U.

Udell *v.* Atherton, 7 Hurlst. & N. 172 794

V.

Valente *v.* Gibbs, 6 C. B. N. S. 270 . . . . . 765, 768, 770, 772, 774
Vere *v.* Lewis, 3 T. R. 182 695
Vidi *v.* Smith, 3 Ellis & B. 969 497
Vivian *v.* Champion, 2 Ld. Raym. 1125, 1 Salk. 141 780

W.

Wackerbath, Ex parte, 5 Ves. 574 . . . . . 698 n.
Walker *v.* Nevill, 3 Hurlst. & Colt. 403 609
Walter *v.* Adcock, 31 Law J., Exch. 380, 7 Hurlst. & N. 541 . . . 422
Walter *v.* Hodge, 2 Swanston 92 522
Walter *v.* Smith, 5 B. & Ald. 439, 1 D. & R. 1 . . . . . 479, 486
Walton *v.* Lavater, 8 C. B. N. S. 191 . . . . . 494, 496
Wanklyn, app., Woollett, resp., 4 C. B. 86, 1 Lutw. Reg. Cas. 597 . . 212 n.
Wansbrough *v.* Maton, 4 Ad. & E. 884, 6 N. & M. 367 173
Ward *v.* Lloyd, 7 Scott N. R. 449 . . . . . 417 n.
Ware *v.* Egmont (Lord), 4 De Gex, M'N. & G. 473 427
Warner *v.* M'Kay, 1 M. & W. 591 471
Waters *v.* Towers, 8 Exch. 401 440
Watson, app., Cotton, resp., 5 C. B. 51, 2 Lutw. Reg. Cas. 53 . 171, 172, 174, 175, 180, 181
Watson *v.* Spratley, 10 Exch. 222 . . . . . 201, 202
Waugh *v.* Carver, 2 H. Bl. 235 650
Webber, In re, 5 C. B. 179 . . . . . 225 n.
Wenham *v.* Fowle, 3 Dowl. P. C. 43 295
Wells *v.* Hacon, 5 Best & Smith 196, 33 Law J., Q. B. 204 . . . 607, 746
Wells *v.* Ody, 7 Car. & P. 410 269
Westoby *v.* Day, 2 Ellis & B. 605 . . . . . 657, 675, 676, 678, 679
Wheatcroft *v.* Hickman, 9 C. B. N. S. 47, 8 House of Lords Cases 268 . 649, 651, 654
Whitchurch, Ex parte, 1 Atk. 210 745
Whitehead *v.* Porter, 5 Best & Smith 193 608
Wightman *v.* Townroe, 1 M. & Selw. 412 . . . . . 645, 651, 652
Wilcox *v.* Huggins, 2 Stra. 907, Fitzg. 178, 289 396

PAGE

Wilkinson *v.* Fairrie, 1 Hurlst. & Colt. 633 226
Williams *v.* Germaine, 7 B. & C. 468, 1 M. & R. 394 . . . . . 696 n.
Williams *v.* Holmes, 8 Exch. 861 486
Willis *v.* De Castro, 4 C. B. N. S. 216 293
Wilson, Ex parte, In re Colbeck, Buck B. C. 48 646
Wilson *v.* Lancashire and Yorkshire Railway Company, 9 C. B. N. S. 632 . 466
Withorn, app., Thomas, resp., 7 M. & G. 1, 8 Scott N. R. 783, 1 Lutw. Reg. Cas. 125 . . . . . 74, 75, 212
Wood *v.* Clarke, 1 C. & J. 484, 1 Tyrwh. 314 486
Woodhouse, app., Woods, resp., 29 Law J., Q. B. 164 . . . . . 216 n.

Y.

Young *v.* Fernie, 33 Law J., Chan. 192 . . . . . 263, 264

TABLE OF STATUTES CITED.

EDWARD I. PAGE

6, c. 1. Statute of Gloucester 805

HENRY VI.

8, c. 7. Right of voting: freeholder 29

HENRY VIII.

27, c. 10, ss. 1–5. Statute of Uses: rent-charge: actual seisin . . 90

ELIZABETH.

35, c. 7. Charitable foundation 36

39, c. 5. Charitable foundation 36

43, c. 2, s. 3. Relief of the poor 55, 56, 59

JAMES I.

3, c. 21. Stage-plays, regulation 688

21, c. 16. Statute of Limitations 392

WILLIAM III.

7 & 8, c. 25, s. 8. Qualification to vote: minor 67, 70

ANNE.

12, stat. 2, c. 23. Stage-plays 688

GEORGE I.

12, c. 36. Putney Bridge Act 121

GEORGE II.

1, c. 18. Putney Bridge Act 121

3, c. 8. Norwich Charter: right of voting 77

9, c. 36. Statute of Mortmain 201

10, c. 28. Dramatic entertainment 685, 686, 688, 692

11, c. 19, s. 21. Distress for rent 479

17, c. 38, s. 12. Rating: out-going tenant 152

25, c. 36. Dramatic entertainment 686, 687

GEORGE III.

17, c. 38, s. 4. Poor-rate: appeal 87

39 & 40, c. 99, s. 17. Pawnbroker: forfeited pledge 479

43, c. 161. Assessed-tax Act 155

48, c. 141. Assessed-tax Act 155

58, c. 45. Church Building Act 703

59, c. 12, s. 7. Assistant overseer 52

c. 184. Church Building Act 703

GEORGE IV. PAGE

6, c. cxliii. Cirencester Turnpike Act 378
7, c. 57. Insolvent Debtors' Act 325
7 & 8, c. 72. Ecclesiastical districts 704
9, c. 69, s. 9. Trespass in pursuit of game 350
10, c. cx. Bath and Chippenham Turnpike Act 364, 386

WILLIAM IV.

1 & 2, c. 32, s. 30. Trespass in pursuit of game 344
2, c. 45, s. 26. Qualification to vote: rent-charge 90
s. 27. Qualification: subject of occupation . . . 168, 175
payment of rates 152
full age 65
prisoner 72
s. 30. Qualification of voter: rating 87
s. 35. Freeman by birth 11
2 & 3, c. 120. Stage-Carriage Act 378, 387, 388, 392
3 & 4, c. 15. Dramatic copyright 689
c. 30. Poor-rate . . . . . 558 n.
3 & 4, c. 74, s. 86. Acknowledgment of married woman . . . 220, 223
c. 103. Factory Act 246, 247, 249, 250, 251, 252, 253
5 & 6, c. 50, s. 71. Railway crossing on a level 587
s. 105. Highway-rate: costs of appeal 214
c. 76, ss. 4, 5. Municipal Corporation Act: burgesses . . . 16
6 & 7, c. 96. Parochial Assessment Act 531

7 WILLIAM IV. & 1 VICTORIA.

c. 78, s. 27. Municipal Corporation Act: reserved rights . . . 16

VICTORIA.

2 & 3, c. 45, s. 1. Railway Act . . . . . 587, 589, 590 n., 592
3 & 4, c. 89. Poor-rate: assessment, &c. . . . . 559 n.
4 & 5, c. lxvii. Kidderminster Rating Act 83
5 & 6, c. 55, s. 9. Railway: crossing a public road 590
c. 116, s. 1. Bankrupt: residence 76
6 & 7, c. 8, s. 73. Premises jointly rented 144
c. 18, s. 33. Revising Court 217
ss. 28–41. Proceedings at Revising Court 6
ss. 42–44. Registration: signature, &c., of case . . 205
s. 75. Rating and payment of rates 156, 157
s. 79. Qualification: residence 74
s. 100. Notice of objection: stamped duplicate . . . 111
Sched. B. No. 10. Notice of objection 1
c. 36. Poor-rate: assessment, &c. . . . . 558 n.
c. 68. Theatrical entertainment 680
7 & 8, c. 15, s. 73. Factory Act: cotton fabric 243
c. 96, s. 7. Bankrupt: residence 76
c. 101, s. 61. Assistant overseer 52
8 & 9, c. 20. Railway: crossing a public road . . . 587, 589, 590 n.
9 & 10, c. 66, s. 1. Settlement: imprisonment 74
c. 95, s. 128. County Court: residence 76, 798

VICTORIA — *Continued.* PAGE

10 & 11, c. 29. Factory Act 248
11 & 12, c. 43, s. 27. Highway-rate: costs of appeal 214
c. 43, s. 5. Aiding and abetting 344
12 & 13, c. 106, s. 125. Bankrupt: order and disposition . . . 499
s. 153. Bankrupt Law Consolidation Act, 1849: action by assignees 745
s. 159. Bankrupt: notice of action 499
s. 224. Bankrupt: deed of arrangement . . . 601
13 & 14, c. 54. Factory Act 243, 248, 251
c. 61, s. 19. County Court: notice of action 499
c. 69, s. 46. Irish Registration Act 214
c. 99. Small Tenements Rating Act 531
14 & 15, c. 39, s. 3. Small Tenements Rating Act 540
15 & 16, c. 54, s. 4. Costs: concurrent jurisdiction 798
s. 6. County Court: notice of action 499
c. 76, s. 7. Common Law Procedure Act, 1852: address of client 239
s. 57. Common Law Procedure Act: general averment of performance of conditions precedent . . . 302
c. lxxvii., s. 118. London (City) Small Debts Extension Act . 801
c. 83, s. 42. Letters patent: account 494
c. 85. District burial board: fees for burial service . . . 702
16 & 17, c. 90, Sched. D. Carrier: duty 364, 378
c. 97. Poor-rate: assessment, &c. . . . . 558 n.
17 & 18, c. 104. Poor-rate: assessment, &c. . . . . 558 n.
c. 105. Poor-rate: assessment, &c. . . . . 559 n.
c. 125, s. 50. Common Law Procedure Act, 1854: discovery . 241
s. 5. Common Law Procedure Act, 1854: interrogatories 757
18 & 19, c. 128. Poor-rate: assessment, &c. . . . . 559 n.
20 & 21, c. 43, s. 2. Appeal from justices: notice 215
c. 81. Burial board 670
21 & 22, c. 27. Chancery Amendment Act, 1858 255
24 & 25, c. 55, s. 4. Settlement: imprisonment . . . . . 74 n.
c. 134, s. 3. County Court: bankruptcy jurisdiction . . 504
s. 192. Bankrupt: composition deed . . 272, 418, 593, 736
c. ccvi. s. 73. Birmingham Improvement Act, 1861: Public dancing, &c. 682
25, c. xiii. Cirencester Roads Act, 1862 . . . . . 380, 388
25 & 26, c. 42. Chancery Regulation Act, 1862 255
c. 103. Union Assessment Committee Act, 1862 . . . 531
c. cxlv. North Eastern and Carlisle Amalgamation Act, 1862 . 229

CASES

UPON

APPEAL FROM DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas and Hilary Terms,

IN THE

TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1864.

The Judges present at the argument of these cases, were,—
ERLE, C. J., KEATING, J.
BYLES, J., and

Borough of DEVONPORT.

RICHARD BENNETT ORAM, Appellant; EDWARD WILLIAM COLE, Respondent. *Nov.* 18.

The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens and overseers, and distinct places of worship; and separate lists of voters are stuck up at the several places of worship by the respective churchwardens and overseers of each parish or township:—

Held, that the objector sufficiently described himself in his notice of objection by stating that he was "on the list of voters for the borough of Devonport *and township of East Stonehouse.*"

1. AT a Court held for the revision of the lists of voters for the borough of Devonport, Edward William Cole objected to the name of John Adams being retained upon the list. The notices of objection were duly served both upon the overseers and on the voter, and were in the following form:—

*2] *"To Mr. John Adams, 33, Union Street, East Stonehouse.
"I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of members for the borough of Devonport and township of East Stonehouse.
"Dated this 24th day of August, 1864.

"EDWARD WILLIAM COLE,
"of 69, Durnford Street, on the list of voters for the borough of Devonport and township of East Stonehouse."

2. It was objected to these notices that it did not appear from them on what list the objector's name was to be found, and moreover that there was in fact no such list as that described in the notice of objection.

3. The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens and overseers, and distinct places of worship; and separate lists of voters are stuck up at the several places of worship by the respective overseers and churchwardens of each parish or township.

4. The list stuck up by the churchwardens and overseers of Stoke Damerel is headed,—"List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the parish of Stoke Damerel."

5. The list stuck up by the churchwardens and overseers for the parish or township of East Stonehouse is headed,—"List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the township of East Stonehouse."

6. On this list the name of the said Edward William Cole appeared with the place of residence as stated in the notice of objection. There is no other Durnford Street in the borough of Devonport than the
*3] Durnford *Street in which the said Edward William Cole lives; and that is within the township of East Stonehouse.

7. The like objection was made to the names of thirty-nine other persons being retained on the lists, the notice of objection in each case being in the same words.

8. The revising barrister held the notices of objection to be good, and expunged the several names from the register. The appeals were consolidated.

9. If the Court should be of opinion that the notices of objection were insufficient, the name of John Adams and those of the thirty-nine other persons mentioned in the schedule annexed to the case, were to be restored to the list of voters from which the same had been expunged, and the register of voters was to be altered accordingly. But, if the Court should be of opinion that such notices of objection were sufficient, the register of voters was to remain unaltered.

Karslake, Q. C. (with whom was *Lopes*), for the appellant.—The description of the objector at the foot of the notice in question is not sufficient: there is no such list of voters as that described. It is not enough to follow strictly the form given in Sched. B. No. 10 to 6 & 7 Vict. c. 18. In Eidsforth, app., Farrer, resp., 4 C. B. 9, 1 Lutw. Reg. Cas. 517, in a notice of objection the objector was described as "R. F., of, &c., on the list of voters for the borough of L." The register of

voters for the borough of L. consisted of four separate lists,—one, of 10*l.* householders for each of three townships comprised in it,—and one, of the freemen of the borough. The objector's name was on the last-mentioned list only: and it was held that he was insufficiently described in the notice, and that the inaccuracy of description was not cured by s. 101. Wilde, C. J., there says that the Legislature evidently meant to *require *the particular parish* to be designated. [*4 "We may collect from that," says his Lordship, "that the Legislature intended that reference should be made to the particular list upon which the name of the objector is to be found. The objector, therefore, does not do that which the statute requires, by stating generally that he is on the list of voters for the borough; or, at all events, he does not do it so distinctly and explicitly as it ought to be done. It is not enough to say that the notice is so framed that the required information may, with more or less difficulty, be obtained elsewhere." And Maule, J., says: "The opinion expressed by Tindal, C. J., in pronouncing the decision of the Court in Tudball, app., The Town Clerk of Bristol, resp., 5 M. & G. 5 (E. C. L. R. vol. 44), 7 Scott N. R. 486, 1 Lutw. Reg. Cas. 7, would have been wholly inapplicable to the case, unless the statute did, in the judgment of the Court, require the objector, if on the list of freemen, to state so." So, in Crowther, app., Bradney, resp., 15 C. B. N. S. 536 (E. C. L. R. vol. 109), 1 Hopw. & Ph. 63, it was again held, that, where there are two lists of voters for a borough, the notice of objection should distinctly state on which the objector's name appears. There, as here, each division had its separate churchwardens and overseers, though it did not appear that there was more than one parish church: and yet Erle, C. J., said: "Where there are two separate lists, the person objecting must state distinctly which of the two he is on." The party must describe himself so as to preclude the possibility of mistake.

Manley Smith (with whom was *Philbrick*), for the respondent, was not called upon.

ERLE, C. J.—I think the decision of the revising barrister was right. Sched. B. Nos. 10 and 11 require *the objector in his [*5 notice to state his place of abode and also the list of voters upon which his name appears: and it has been decided, that, where there are more lists than one for a borough, he must accurately define the particular list which the party whose vote is objected to must examine in order to see that he has a real objector. I think the objector here has properly complied with the requirement of the statute. He describes himself as "of 69, Durnford Street, on the list of voters for the borough of Devonport *and township of East Stonehouse*." I think this is an extreme endeavour to pervert the meaning of the words of the notice. It appears that the borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse, each having distinct churchwardens and overseers and distinct places of worship, and that separate lists, properly headed, are stuck up by the respective functionaries. The list stuck up by the churchwardens and overseers of the parish or township of East Stonehouse is headed, "List of persons entitled to vote for the borough of Devonport, in respect of property occupied within the township of East Stonehouse;" and Durnford Street is in the township of East Stone-

house. I think, therefore, this objector has sufficiently referred the party objected to to the list which relates to the township of East Stonehouse. I do not see how he could have give a more accurate description.

The rest of the Court concurring,

Decision affirmed, with costs.

---

*6] *LANCASHIRE,—Southern Division.

THOMAS GOAD BLAIN, Appellant; THE OVERSEERS OF THE TOWNSHIP OF PILKINGTON, Respondents. *Nov.* 18.

1. Two barristers, A. and B., were appointed to revise the lists of voters for a county. At a Court held by A., the name of C. was, upon objection, expunged from the list on which it appeared, C. not being present to support his right, and A. duly initialed the erasure, and signed the list as settled by him.

At a Court held by B. on the following day, C. attended and satisfied B. that his absence on the preceding day was excusable; whereupon B. consented to rehear the matter (though his power to do so was contested), and ultimately restored C.'s name to the list:—

Held,—it not appearing that the objector was present on the second occasion *with the proofs necessary to sustain his objection*,—that the course taken by B. was not justifiable.

2. Whether B. could under any circumstances lawfully reopen the decision of his colleague, *Quære?*

1. THIS was an appeal from a decision of one of the revising barristers appointed to revise the lists of voters for the southern division of Lancashire, upon certain points of law arising out of the following facts:—

2. "At a Court held by adjournment in Bury, on the 13th of October, 1864, before me, appointed to revise the lists of voters in the election of members of Parliament for the southern division of Lancashire, the Rev. Thomas Corser, incumbent of Stand, in the township of Pilkington, applied to have his name restored on the list for that township.

3. "The name had been removed from the Pilkington register in due course of proceeding by my colleague, one of the other revising barristers for the same division of the county, at a previous sitting of the Court in Bury, in consequence of its having been duly objected to, and of the absence of the applicant, or any one on his behalf, when the name in its order was called. At the time in question, the applicant had been in attendance on his bishop, in performance of his duties as rural dean of Bury; but with due precaution, he had provided a fit and proper person to attend the revising barrister's Court on his behalf, and support his right to remain on the register.

4. "Upon this application being made, objection was taken that I had no power to entertain it.

*7] *5. "But I was of opinion,—firstly, that, although the list in question had been gone through and been duly initialed and signed by my colleague, yet, as it was still in my hands, my power to do in open Court all things proper for perfecting the list in accordance with the intention and purpose of the statutes in that case provided still remained,—Secondly, that the marks of erasure upon the name and qualification of the applicant in the list, accompanied by

the initials of my colleague in the margin, were to me sufficient evidence that a valid notice of objection in this particular instance had been duly proved in open Court; and that it was competent for me, without further proof of such notice, to investigate the right of the applicant to be upon the register,—thirdly, that such investigation, after being initiated by proof of such notice, is a proceeding in the hands of the revising barrister solely, and is not invalidated by the absence of the objector or his agent, or, if present, by any refusal on their part to assist.

6. "Being further of opinion that the applicant through no default in him had been removed from the register, I did, in the exercise of my discretion, entertain the application; and, upon investigation of his right, being satisfied that he was entitled to be on the register, I restored his name.

7. "If the Court should be of opinion that I had power so to do, the name is to remain on the register; but, if otherwise, it is to be erased."

Keane, Q. C., for the appellant.—Two gentlemen, A. and B., were appointed to revise the lists of voters for the southern division of Lancashire. The list in question being brought before A. with an objection to the name of the Rev. Mr. Corser being retained therein, and no one being there to sustain his right, A. struck *out his [*8 name. Having done this, it was perfectly competent to A. at once to transmit the list as settled by him to the clerk of the peace by post at the rising of the Court. The whole list, however, not having been gone through on that day, his colleague, B., appeared in Court on the following day to finish it. Mr. Corser attended, and, suggesting what was no doubt a very sufficient excuse for his non-appearance on the preceding day, prayed B. to reopen the matter, and B. accordingly did so, and restored Mr. Corser's name to the list. This, it is submitted, he had no power to do. The appointment of revising barristers is regulated by the 28th and 29th sections of the 6 & 7 Vict. c. 18. The 30th section enacts, that, "where two or more barristers shall be appointed for the same county, riding, parts, or division of a county, or for the same city or borough, they may hold separate courts at the same time and place for the despatch of business, or may hold separate courts at different times and places, as shall be deemed most expedient." The mode of proceeding at the court of revision is regulated by s. 41, which enacts that "every such barrister shall upon the hearing in open Court *finally determine upon the validity of the claims and objections*, and shall for that purpose have the same powers and proceed in the same manner (except where otherwise directed by this Act) as the returning officer of any county, city, or borough, according to the laws and usages observed at elections previous to the passing of the recited Act [2 W. 4, c. 45]; and such barrister shall in open Court write his initials against the names respectively expunged or inserted, and against any part of the said lists in which any mistake shall have been corrected or any omission supplied, or any insertion made by him, and shall sign his name to every page of the several lists so settled." [BYLES, J.—It sufficiently *appears that the objector was present when the name of [*9 Mr. Corser was reinstated.] That may be so; but it is one thing

to be present, and another to be prepared with proofs. The revising barrister who had the list before him upon the first occasion heard the matter, and *finally* determined the validity of the objection, by writing his initials against the erasure, and signing the list so settled. The second revising barrister had no authority to correct what had been done by the first. Even Judges of the superior Courts never interfere with each other's decisions at Chambers, except on appeal. Some light is thrown upon the matter by s. 40, which provides, amongst other things, that, "if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister *before he shall have completed the revision of such list*, in which case he shall then and there insert the same in such list." But there all the parties are present, and the matter is properly proved.

No person was instructed to appear on behalf of the respondent.

ERLE, C. J.—I very much wish I could have supported the revising barrister in this case; but I feel compelled to come to the conclusion that he has done wrong. Two barristers were appointed to revise the list of voters for the southern division of the county of Lancaster; and at a court held by one of them a question was raised *10] between a person whose name *appeared upon the list of voters and one who had duly given a notice of objection to his name being retained therein. It was a trial in foro contentioso. The objector was there to sustain his objection: the voter was not there to support his right to be upon the register. The revising barrister disposed of the question against the voter, expunging his name from the list, and placing his initials against it. On the following day, as I read the case, the voter came before the other revising barrister, and satisfied him that his absence on the preceding day was justifiable, and prayed a rehearing. The last-mentioned revising barrister thought fit to accede to the application: and eventually he restored the name of the voter to the list. Now, the ground upon which I hold that this was an unjustifiable proceeding, is, that it does not appear to me that the objector was there *and ready to be heard:* and so there was really a decision in foro contentioso in the absence of one of the litigant parties.

When a proper occasion arises, I should wish to say a word or two upon the other point. I should be to the last degree desirous of sanctioning the power in any tribunal to correct any error in point of form in its own proceedings; but I cannot but see that there is a material distinction between amendments which are made whilst a proceeding is pending, and amendments which are made after a matter has been heard and finally determined; and I much doubt the power of a revising barrister to do that which in effect amounts to granting a new trial. But I entertain still greater doubt whether, where two revising barristers are appointed with power to act jointly and severally, and one of them has heard and finally decided as to the validity of a claim or objection, the other has authority to reopen

the matter, and hear the case over again and come to a different conclusion. But I am clearly of *opinion, that, as it does not appear that the objector was present with his proofs on the second occasion, we ought to hold that the decision first come to was conclusive, and that the reversal of that decision was wholly unwarranted. For this reason I think the appeal must be allowed. [*11

The rest of the Court concurring, Decision reversed.

Borough of BARNSTAPLE.

JOHN GAYDON, Appellant; LIONEL BENCRAFT, Respondent. *Nov.* 18.

1. In a borough in which prior to the passing of the Reform Act freemen by birth were entitled to vote on attaining the age of twenty-one, that right is by s. 32 preserved to all the lineal descendants of such freemen.

2. Therefore, a freeman by birth, whose *grandfather* was a freeman so entitled previously to the 1st of March, 1831, but whose *father* (being then under age) was not on that day entitled to be admitted a freeman, is entitled to be registered.

1. AT a Court held for the revision of the lists of voters for the borough of Barnstable, on the 19th of September, 1864, William Saunders was inserted in the list of freemen entitled to vote for the said borough, thus,—

Christian and surname of each freeman at full length.	Place of abode.
William Saunders.	Holland Street, Barnstaple.

2. His name was duly objected to by Tom John Pitts Tucker. The facts proved were as follows: —

3. In the borough of Barnstaple there is a body of *freemen. The sons of these freemen are entitled, on proving their fathers' marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen of this borough: but they cannot claim from or through any other relative than their father, and in no other way than that described. The said William Saunders was duly admitted as a freeman (by right of birth, from his father) to the said borough on the 31st of July, 1856. His father was admitted also, by right of birth, on the 2d of May, 1831, having only come of age on the 4th of April in that year. The grandfather was admitted, by right of birth, on the 14th of October, 1810. [*12

4. On this state of facts, it was contended on the part of the objector, that, as the said William Saunders derived his right to be admitted as a freeman of the said borough through his father, from and through whom alone he could claim, and as it was necessary by the 32d section of the Reform Act, 2 W. 4, c. 45, that the father, to give him the right claimed (viz. to be on the list of freemen voting for the borough), should have been admitted a freeman, or have been entitled to be admitted as a freeman, previously to the 1st day of

March, 1831, and that, as he (the father) was not admitted till the 2d of May, 1831, nor entitled to be admitted till he came of age, on the 4th day of April in that year, his right to be placed on the list of freemen voting for that borough could not be sustained.

5. On the other side, it was contended, in support of the vote, that, although the father could not have been admitted as a freeman till he came of age, he had an inchoate right to be so admitted previously to the 1st day of March, 1831, which was perfected on his coming of age; and that this was sufficient to satisfy the provisoes of the 32d section of the Reform Act, and to sustain the vote.

*13] *6. The revising barrister held that the said William Saunders originally derived his right from or through his father, and that there was no one from or through whom he thus derived his right who was a freeman or entitled to be a freeman previously to the 1st day of March, 1831, and that the vote could not be sustained: and he struck his name out of the list.

7. If the revising barrister was right in this opinion, the list of freemen for this borough was to remain as it is: if he was not right, the list was to be amended by inserting the names of the appellant William Saunders, and John Gaydon, an appellant thereinafter mentioned, in a consolidated appeal. And he declared that the appeal of the said John Gaydon and this appeal depended on the same decision, and ought to be consolidated: and he named Gaydon to be appellant, and the town clerk of Barnstaple to be respondent.

8. The name of John Gaydon stood in the list of the freemen for the borough of Barnstaple entitled to vote at the election of members of Parliament for that borough, thus,—

Christian and surname of each freeman at full length.	Place of abode.
John Gaydon.	Boutport Street.

W. M. Cooke, Q. C. (with whom was *The Hon. R. Bourke*), for the appellant.—The revising barrister, it is submitted, has taken an erroneous view of the second proviso in the 32d section of the 2 W. 4, c. 45. That section enacts, that "every person who would have been entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough not included in the schedule marked A. to this Act annexed, either as a burgess or free-

*14] man, *or, in the city of London, as a freeman and liveryman, if this Act had not been passed, shall be entitled to vote in such election, provided such person shall be duly registered according to the provisions hereinafter contained; but that no such person shall be so registered in any year, unless he shall on the last day of July in such year be qualified in such manner as would entitle him then to vote if such day were the day of election and this Act had not been passed, nor unless, where he shall be a burgess or freeman or freeman and liveryman of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year within such city or borough," &c., &c. "Provided always, that no

person who shall have been elected, made, or admitted a burgess or freeman since the 1st of March, 1831, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made, or admitted a burgess or freeman otherwise than in respect of birth or servitude, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid: Provided also, that *no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted as a burgess or freeman, previously to the 1st of March*, 1831, or from or through some person who since that time shall have become or shall hereafter become a burgess or freeman in respect of servitude." The question is, whether by that section the right of freemen and burgesses to vote in right of birth and servitude is preserved to them in perpetuity, or only to the sons of those who were burgesses or freemen or entitled to be admitted as burgesses or freemen on the 1st of March, 1831,—the day on which the first Reform Bill was brought into the House of Commons. At the *time of the passing of the Reform Act, the right of voting as a burgess or freeman was obtainable by [*15 purchase or by gift, and in some boroughs by marriage, as well as by birth and servitude. The object of the 32d section, as Maule, J., observes, in Croucher, app., Browne, resp., 2 C. B. 97, 107 (E. C. L. R. vol. 67), 1 Lutw. Reg. Cas. 388, was, "to prevent the repetition of the corrupt practices that had before existed in certain boroughs, of making on some particular occasion a large number of new voters, for the purpose of swamping the old constituency." The present claimant clearly is not one whom the legislature intended to exclude. The words "from or through," the revising barrister construes to mean claiming by direct descent from his *father*, and therefore, he holds, where, as here, the father was not of age on the 1st of March, 1831, the son acquires no vote. That clearly is not the meaning of the Act. This person claims from his grandfather, through his father. Gale, app., Chubb, resp., 4 C. B. 41 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 544, is precisely in point. The corporation of Malmesbury consists of four classes of burgesses or freemen,—1. capital burgesses, (in whom alone was the right of voting prior to the passing of the Reform Act),—2. assistant burgesses,—3. landholders,—4. free burgesses or commoners. Vacancies in the third class are supplied from the fourth, by seniority, and, in the other classes respectively, by election. It was held that one who was a member of the fourth class, *by right of birth*, before the 1st of March, 1831, and became a "capital burgess" by election after that day, was not disqualified as an elector by the 2 W. 4, c. 45, s. 32. But for the second proviso in that section, the sons of honorary freemen would have been entitled to be registered. Mr. Elliott remarks upon this section,—Elliott on Registration, 2d edit. 214,—"The elective rights of all burgesses and freemen and of the freemen *and liverymen of the city of London are reserved [*16 in perpetuity, subject to the exceptions and conditions mentioned in this section. Thus, persons made or admitted burgesses or freemen after the 1st day of March, 1831, will not have the right to be registered, unless admitted in respect of birth or servitude; and, further, where the claim is in respect of birth, the right must be originally

derived from or through some person who was actually a burgess or freeman, or entitled to be admitted as such, previously to the 1st day of March, 1831, or from or through some person who since that time has become a burgess or freeman in respect of servitude. Thus, all honorary freemen and burgesses made after the 1st day of March, 1831, are excluded from the right of voting; so, also, it would appear, persons acquiring their freedom by marriage subsequently to that day." To this the editor appends the following note, putting this very case,—"The following question has been raised upon these words, whether a freeman by birth is entitled to vote, whose grandfather was actually a freeman previously to the 1st day of March, 1831, but his father, being under age at that time, was not entitled to be admitted till after that date. It is contended that his right, though directly derived through his father, was originally derived from the grandfather. Such a construction appears consistent with the words and principle of the proviso." [Byles, J.—The claimant is within the qualifying words: the only question is whether he is disqualified by the proviso.] It is submitted that he is not. Some light may be thrown upon the matter by a reference to the 4th and 5th sections of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, amended by the 7 W. 4 & 1 Vict. c. 78, s. 27. [Byles, J.—Those provisions merely reserve the rights, whatever they might be.]

*17] **Dowdeswell*, for the respondent.—The evident intention of the second proviso in the 32d section of the Reform Act, was, to limit the right to vote in respect of freedom by birth to those who were themselves entitled to be admitted freemen on the 1st of March, 1831, or who are the immediate descendants of those so entitled on that day; and not to extend it to all time. From whom did this person derive his right? From his father, not from his grandfather. Suppose the son of a freeman died without having been admitted, though it might be otherwise in some boroughs, in Barnstaple it is plain the grandson could not be admitted. In Ashby *v.* White, 2 Ld. Raym. 938, 943, 6 Mod. 46, 1 Salk. 19, 3 Salk. 17, Ld. Holt 524, Powys, J., says: "There is a vast intricacy in determining the right of electors, and there is a variety and a different manner and right of election in every borough almost. As, in some boroughs, every potwaller has a right to vote; in some, residents only vote; and in others, the outlying burgesses that live a hundred miles off: nay, I know Ludlow, a borough where all the burgesses' daughters' husbands have a right to vote." [Byles, J.—Was there in this borough a right acquired by servitude?] That is common to all boroughs. In respect of birth, the revising barrister finds, that, in Barnstaple, the party must claim through his father. [*Cooke*.—It may be conceded, that, if the father had never taken up his freedom, the son could not take from his grandfather.] The contention before the revising barrister was, that the father had an inchoate right to be admitted a freeman prior to the 1st of March, 1831. If that be so, a child in ventre sa mere might acquire the right. [Erle, C. J.—Your contention is that the right in respect of freedom by birth is continued only for one generation?] Yes. [Erle, C. J.—I do not see why a free-

*18] man's son should have *the franchise preserved to him, and not his son's son.] The limit was an arbitrary one, no doubt: but

it must be borne in mind that this was the result of a compromise in Parliament. If this man's father had died under twenty-one, the son never could have been admitted by right of birth: he must derive the right from a person who was admitted or entitled to be admitted. [BYLES, J.—Do you find any instance in the Act of a reserved right being continued for one generation only? ERLE, C. J.—The right is certainly continuous as regards the votes of freemen by servitude: and so I should say the Legislature intended that the freeman should transmit the right in respect of birth so long as he has lineals.] Could a man claim from his maternal grandfather? As to Gale, app., Chubb, resp., 4 C. B. 41 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 544, all that was decided, was, that a man who was a member of the fourth class of burgesses or freemen *by right of birth* before the 1st of March, 1831, did not lose any right which that gave him, by being promoted to the first class.

Cooke was not called upon to reply.

ERLE, C. J.—I think the revising barrister was wrong in this case. The question is, whether the right of voting as freemen is by the 32d section of the Reform Act preserved to freemen (by birth) for one descent only, or is preserved continuously to the lineal descendants of one who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st of March, 1831. I think the Legislature intended to preserve it continuously to all descendants of burgesses or freemen. The 32d section begins with a general enactment that every person who would have been entitled to vote in the election of a member *or members to serve in any future [*19
Parliament for any city or borough (not disfranchised), either as a burgess or freeman, or in London as a freeman and liveryman, if the Act had not been passed, shall be entitled to vote, being duly registered. Then comes a proviso that no person who shall have been or who shall hereafter be elected, made, or admitted a burgess or freeman, *otherwise than in respect of birth or servitude*, shall be entitled to vote or be registered. The right, therefore, to vote is preserved to all who become freemen by birth or servitude. Then comes the proviso or exception upon which this question arises,—"Provided also that no person shall be so entitled as a burgess or freeman in respect of birth, unless his right be originally derived from or through some person who was a burgess or freeman, or entitled to be admitted a burgess or freeman, previously to the 1st of March, 1831." This is a limitation upon the general enactment contained in the earlier part of the section. I think the present claimant fulfils the requirement of the proviso. He derives his right to be admitted a freeman by or through a person who was a freeman previously to the 1st of March, 1831, viz., from his grandfather. His grandfather was admitted a freeman by right of birth in 1810, and his father became entitled to be admitted on the 4th of April, 1831, and was actually admitted on the 2d of May in that year. I think the Legislature intended to preserve the right of voting to freemen by birth as a continuous lineal right to all persons claiming to be freemen by or through some person having that right at the time limited by the Act, and did not intend to restrict it to one generation after the passing of the Act. This person claims from his grandfather and through his father. I am

confirmed in that view, because the Legislature has preserved the
*20] right to freemen by servitude, and enacted that persons *claiming by descent from freemen by servitude are to be continued in their right in perpetuity; for, the proviso goes on,—"or from or through some person who since that time [viz., the 1st of March, 1831], shall have become or shall hereafter become a burgess or freeman in respect of servitude." It contemplates, therefore, the preservation of the right in all future time to the sons of freemen by servitude; and it is in the highest degree improbable that the Legislature should have intended to limit the right in the case of freemen by birth to one generation. The revising barrister here finds, that, in the borough of Barnstaple "the sons of freemen are entitled, on proving their father's marriage, that they were born of that marriage, and that they have attained the age of twenty-one years, to be admitted as freemen, but that *they cannot claim from or through any other relative than their father.* But I take it that statement is to be construed with reference to this statute. No doubt, a freeman claiming by lineal descent must claim through his father. The statute clearly did not contemplate that no freeman should claim in right of birth unless his *father* was admitted or entitled to be admitted a freeman on the 1st of March, 1831. The decision of the revising barrister must be reversed.

BYLES, J.—I am of the same opinion. I have paid the utmost attention to Mr. *Dowdeswell's* argument: but I cannot entertain a doubt as to the true construction of this proviso. The facts are extremely simple. In this borough, prior to the passing of the Reform Act, freemen by birth were entitled to vote. In the year 1810, the grandfather of the claimant was admitted a freeman by birth. At the time mentioned in the Act, viz., the 1st of March, 1831, his son (the father of the claimant) was a minor. He came of
*21] age on the 4th of April in that year, and was admitted a *freeman by right of birth on the 2d of May. It is plain, therefore, that the claimant is within the preserving words of the 32d section of the Reform Act, and entitled to be registered, unless his right is taken away by the second proviso. But it seems to me that he satisfies that proviso; for, he claims by or through some person who was a burgess or freeman previously to the 1st of March, 1831. There is no reason why the words "his father" should be substituted for "some person." And there is no instance throughout the Act in which the right of voting is preserved for one generation only.

KEATING, J.—I am of the same opinion. The question raised by the case is, whether a freeman by birth is entitled to vote, where his father was entitled as a freeman before the 1st of March, 1831, and his father, not being then of age, was not entitled to be admitted a freeman until after that date. Looking at the whole scheme of the enactments contained in the Reform Act, I think it was not the intention of the Legislature by anything contained in the 32d section to exclude such a person from the exercise of the franchise.

Decision reversed.

*County of Leicester.—Northern Division. [*22

GEORGE STEELE, Appellant; JOHN ALLEYNE BOSWORTH, Respondent. *Nov.* 18.

In 1692, the Earl of Rutland founded a hospital at Bottesford for fourteen poor men; and by a deed of 1762 the lands belonging thereto were *vested in trustees*, in trust to permit the rectors for the time being of two parishes named to receive the rents and profits, and thereout pay to each of the fourteen inmates certain periodical sums (in the whole amounting to 6*l.* 12*s.* 8*d.* per annum), and to expend upon them certain other sums in clothing, coals, medical and other attendance, &c. Since the year 1778, the trustees had been in the habit of allowing the surplus revenue to be distributed amongst the inmates of the hospital, so that each had down to the present time been in the receipt of 9*s.* 2*d.* per week, exclusive of the allowance for clothing, &c.: but there appeared nothing in the deed of 1762 to warrant this increased allowance:—

Held, that the inmates had not any equitable freehold estate or interest in the lands belonging to the hospital, so as to entitle them to be registered for the county.

At a court held to revise the lists of voters for the northern division of the county of Leicester, at Bottesford, John Alleyne Bosworth duly objected to George Steele as not having been entitled on the last day of July, 1864, to have his name retained upon the list of voters for the parish of Bottesford, in the said division.

1. The name of George Steele stood on the copy of the register of the said parish as follows:—

Christian and surname.	Place of abode.	Nature of qualification.	Street, lane, &c., where the property is situate, &c., or name of the property, if known by any, &c.
Steele, George.	Bottesford.	Freehold interest in land.	Hospital land.

2. It was proved in evidence before the revising barrister, that George Steele was an inmate of the Bottesford Hospital for men, in the same parish, founded by the Earl of Rutland in or about the year 1692, which from time to time was augmented until the year 1762, when certain lands and tenements in Bottesford, Muston, Abkettleby, Holwell, and Long Clawson, were reconveyed to certain trustees therein named, and which conveyance,—after reciting that the rents of premises comprised in certain indentures *therein recited had [*23 for some time been found sufficient for the support of fourteen poor people, and the said Duke being desirous to extend the said charity to the maintenance of two other poor persons, had directed two more to be added to the twelve poor people already provided for out of the revenues of the said hospital,—declared that the said trustees should stand possessed of the said lands and tenements, upon the following trusts, that is to say, "In trust that they the said trustees and the survivors and survivor of them should permit and suffer the rectors of the rectories of Bottesford and Harly, respectively, for ever, to receive and take the rents and profits of all and singular the said messuages, lands, and premises thereby respectively granted, bargained, and sold, as often as the same should become due and payable, to the intent and purpose that they the said rectors and their successors, or the rectors for the time being of Bottesford and Harly aforesaid respectively, for ever, should and would by and out of the said

rents and profits pay and distribute to the fourteen poor men who then were or thereafter should be legally and rightfully admitted into and placed in the said hospital, that is to say, to each and every of them once in every month the sum of 10*s.* 8*d.* of current British money, and also the sum of 6*d.* to each and every of the said poor men at four several times in the year, namely, at Easter, Whitsuntide, Bottesford Feast, and Christmas, for pye-money; and also the sum of 10*d.* to each and every of the said poor men in December every year, for and in lieu of capon-money; and also in February and August yearly to every of the said poor men 6*d.* a time for buying them salt; and also to every of them the said poor men the sum of 10*d.* in September yearly for the finding them with candles; and also the sum of 1*s.* 6*d.* every month to the fire-maker for the making each
*24] of *the said poor men's fires; and also the sum of 30*s.* for each and every of the said poor men in April yearly for the providing every of them a suit of clothes, and to each and every of them a good cloth gown and making at Easter every other or second year; and also the sum of 6*s.* 8*d.* a man to the laundress for washing each poor man, at Lady-day and Michaelmas yearly, by even and equal portions; and also, out of the said rents, to find and provide for each of the said poor men 20 cwt. of hard coals to be laid in yearly in the mouth of May; and also thereout from time to time and at all times thereafter to find and provide all necessary and reasonable beds and bedding, household goods, and other necessary utensils, for the use and benefit of the said poor men, but at the discretion of the said trustees parties to these presents; and should maintain, repair, and keep the said hospital or almshouse with all necessary amendments and reparations, and also provide physic and attendance for the sick: And, in case the said trustees or their successors, or the rectors for the time being of Bottesford and Harly aforesaid, should neglect or refuse to act or concern themselves in the said trust pursuant to and to be guided by the directions aforesaid, then and in such case it was thereby declared and agreed by and between all the said parties to these presents, and the said John Duke of Rutland (party thereto) did authorize and empower the said trustees or any three of them, by any writing under their hands respectively, and also any subsequent grantees of the said premises, to nominate and appoint three or more honest and discreet persons to act and be concerned in the said trust, in such manner as the rectors aforesaid or any of them might or were to do by virtue of these presents and of the powers aforesaid: And it was thereby declared and agreed by and between
*25] all the said *parties to these presents, and the said John Duke of Rutland (party thereto) did declare, that the sole power of nominating and appointing any person or persons whatsoever to be placed and admitted in the said hospital should be and remain in the said present Duke (party thereto) and his heirs male for ever; and, in case of failure of such heirs male, then the lord or lords of the manor of Bottesford aforesaid at the time of such failure, and their successors, lord or lords for the time being there, should have the right of nomination and placing of poor persons in such manner as the said Duke then had, and his heirs might have: And it was further declared, that, in case any of the said poor men, after such their nomi-

nation or admission into the said hospital, should any ways abuse the said charity by their immoral-like profaneness or lewdness, or other misbehaviour, then it should and might be lawful for and be in the power of the said then present Duke (party thereto) or his heirs, or, for failure of such, for the lords of Bottesford and their successors or lords of Bottesford for the time being, to remove and displace such person or persons, so as he or they should have no benefit or advantage of the said charity, and to nominate and appoint any other person or persons in the place and stead of such person or persons so to be removed."

3. In the said conveyance is also contained a declaration that the said trustees should demise or lease all or any part of the said premises for a term not exceeding twenty-one years, so as upon every such lease there be reserved the full and improved rent, without any fine to be paid.

4. It was further proved that the said George Steele was paid by the trustees of the hospital the sum of 9*s.* 2*d.* per week; that the appointment of the hospital men by the Duke of Rutland for the time being was *by word of mouth or by letter to his agent who reduced such appointment in writing, and forwarded it to the [*26 parties so appointed; that there was in the said hospital a common hall where the hospital men had their meals; that each man occupied a separate room with a pantry, and that all the apartments were numbered; that the entrance to the said hospital is by one outer door into a passage at the end of which is a second door, and all the inner doors of the said apartments open into the said passage; that a matron is appointed by the said trustees, who has apartments allotted to her, and who receives a salary of 20*l.* per annum, and whose duties consist in the general superintendence of the hospital, in cleaning the apartments, and in cooking and washing for the said hospital men; that the said hospital men pay no rates or taxes, and never repair the apartments; that they enjoy the use of an orchard and garden adjoining the hospital, and are supplied from the funds of the trust with coal, medicine, medical attendance, and all necessaries (except meat and provisions); that they also receive a cloak apiece once in two years; that they have uninterrupted enjoyment of their apartments, together with a key, and with a power of ingress and egress at any time, but that, after 9 o'clock at night, the matron by arrangement among the hospital men locks the outer door, and hangs up the key in the passage; that no instance has been known of any one of the hospital men being removed, although a power of amotion is contained in the deed, for immorality, profaneness, lewdness, or other misbehaviour; nor has any instance been known of any of the poor men having ever sublet their apartments; that, as the rents of the said lands and tenements mentioned in the said deed of reconveyance increased, such increased rents were distributed amongst the hospital men from time to time; *and that, so far back as the [*27 year 1778, each man has been in receipt of upwards of 10*l.* per annum, and each man is now in actual receipt of 9*s.* 2*d.* per week, exclusive of the coals and gown.

5. Upon proof of the above facts, the revising barrister held,—First, that, although the weekly payments to each of the hospital men

amounted to more than 10*l.* per year, as the power of appointment and amotion expressed in the deed appeared to him to be discretionary with the Duke of Rutland for the time being, the said George Steele had not such on equitable freehold interest in land as to entitle him (under the provisions of the 2 W. 4, c. 45, s. 18) to have his name retained upon the register of voters for the said parish of Bottesford, in the said division of the said county,—Secondly, that, even if that were not so, the said George Steele was simply a member of an eleemosynary institution, and as such was not entitled to have his name retained upon the said register.

6. There were thirteen other names upon the existing register for the said parish, and two on the list of new claimants, whose right to be retained or otherwise depended upon the decision of the Court in the case of George Steele.

7. The revising barrister expunged the names of the said thirteen persons on the old register, and disallowed the said two new claims.

8. If the Court should be of opinion that the revising barrister was wrong, then the name of the said George Steele, together with the names of the thirteen other persons, were to be restored to the register, and the two new claims were to be allowed.

Mellish (Q. C.), for the appellant.—It will not be disputed, that, if these persons have any estate at all, it is an equitable freehold for
*28] life. The case finds that *the inmates of this hospital are removable only for misbehaviour. Then does the mere circumstance of this being a charitable foundation prevent the parties from acquiring the franchise? If an estate be given to a man from motives of charity, that clearly will not prevent the donee from acquiring the right to vote. According to the deed set out in the case, certain sums are to be paid to each of the fourteen inmates of Bottesford Hospital, which in the aggregate exceed 10*l.* per annum. No mode of disposing of the surplus arising from the increase in the value of land is pointed out: but it is found as a fact that the trustees do divide the whole surplus among the inmates; and it must be assumed that that is in accordance with the true construction of the deed. If the trustees were, without just cause, to remove one of these persons, would he not have a remedy by bill in equity to recover his aliquot share of the rents? If so, he clearly has an equitable freehold within the 18th section of the Reform Act. In Davis, app., Waddington, resp., 7 M. & G. 37 (E. C. L. R. vol. 49), 8 Scott N. R. 807, 1 Lutw. Reg. Cas. 159, the inmates of Jesus Hospital, Rothwell, were held not to have such an estate as entitled them to be registered as freeholders, because the trustees had power to remove them "toties quoties sibi *conveniens* fore videbitur."(*a*)—In Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168, the qualification in respect of which the right to vote was claimed, was, the room in which the party lived, and not the share in the profits of the land. That case has been observed upon and somewhat shaken since. The cases, however, which will be mainly relied upon on the other side,
*29] are Heartley, app., Banks, resp., 5 *N. C. 40, K. & G. 219, and Freeman, app., Gainsford, resp., 11 C. B. N. S. 68 (E. C. L. R. vol. 103), K & G. 448. In the former of these cases, the claim was

(*a*) He referred to a learned note by Serjeant Manning, 7 M. & G. 45 et seq.

of a borough vote by the military knights of Windsor, in respect of a supposed interest in the houses occupied by them: and Cockburn, C. J., in delivering the judgment of the Court says: "Whether the interest of these parties in the benefits of the charity be a freehold interest or not, we are of opinion that there is no such estate or interest in these houses as can properly be deemed an ownership. The legal estate is in the dean and canons of Windsor; and, though they may be bound to allow the knights to occupy these houses, yet it appears that the dean and canons have power and authority to impose such restrictions on the enjoyment as to divest the occupation of the character of ownership. The knights cannot let their houses in the whole or in part, except with the assent and sanction of the dean and canons. The language, too, of the grant, and of the statutes of the institution, speaks of the houses or rooms of the knights (for, both terms are used,) in language inconsistent with the idea of ownership." The decision in Freeman, app., Gainsford, resp., proceeded entirely upon the authority of Heartley, app., Banks, resp. The claim there was in respect of the house in which the party lived: and the Court held that he did not take "an equitable freehold in the chambers in the hospital wherein he resided, so as to entitle him to vote under the 8 H. 6, c. 7." "When," says Erle, C. J., "the governor finds him rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity." That, it is submitted, is the true test. Here, the claim is in respect of an interest in the lands themselves. If the surplus profits are to go to the inmates, they clearly have an equitable interest in the lands.

**Hayes*, Serjt., for the respondent.—The terms of the deed negative there being any freehold interest whatever in the recipients of this charity. The lands, and even the household goods, are all vested in the trustees: all that the inmates are entitled to under the deed, is, 10*s.* 8*d.* per month, and certain other trifling money payments, amounting altogether to considerably less than 10*l.* a year. And the trustees are to do all the repairs. The same point that is raised here was raised in Ashmore, app., Lees, resp., 2 C. B. 31 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 337. The inmates of an hospital in the county of York, founded and endowed by the Duke of N. in 1673, claimed to be registered for the county of Nottingham. It appeared that the revenues of the hospital were derived from lands, and corn-rents in lieu of tithes of lands, in Yorkshire and Nottinghamshire, which were vested in trustees; that the whole formed one fund, out of which the trustees paid a weekly stipend to each inmate; that, originally, each inmate received 2*s.* 6*d.* per week, and a certain weekly allowance of coals and clothing; but that the weekly payment had subsequently been increased to 10*s.*; that, by one of the constitutions of the charity, it was provided, that, if at the end of any year there should be found in the treasury of the hospital above 100*l.*, the surplus should be divided amongst the pensioners; and that the appointment was for life, no instance of dismissal being known. By an Act of Parliament modifying the constitutions of the charity, it was provided, that, instead of having the surplus revenues distributable amongst the original number of pensioners, additional pensioners should be chosen; and the trustees, under the direction of the Duke, [*30

were empowered and directed from time to time to add as many more pensioners as the revenues of the hospital would allow (leaving a sufficient surplus for repairs and incidental expenses); and the trustees
*31] *were, under the directions of the Duke, to pay the pensioners *such fixed stipends as they should think fit* (having regard to the revenues of the hospital), *and to lessen or increase, vary, change, and alter such weekly stipends, as they should find requisite, so that the stipends should at no time be reduced below 3s. 6d. a week.* The revising barrister having held that the inmates had no legal or equitable interest in the funds(*a*) of the hospital to a sufficient amount to entitle them to be registered, assuming that they had no absolute right to more than 3*s.* 6*d.* per week,—the court affirmed his decision. In Simpson, app., Wilkinson, resp., there were no trustees: the recipients of the charity were letting part of the premises, and receiving and dividing the proceeds among themselves. [BYLES, J.—The ground stated for that decision in the judgment in Heartley, app., Banks, resp., was not the real ground on which it proceeded.] It was not. In Freeman, app., Gainsford, resp., Erle, C. J., says: "I do not accede to the suggestion that the Court is put to its election between the case of Simpson, app., Wilkinson, resp., and that of Heartley, app., Banks, resp. The question submitted for the opinion of the court in the former case was, not whether the claimants had an equitable freehold in the rooms allotted to them, but whether the revising barrister was right in holding that a legal foundation might be presumed, not necessarily investing the claimants with a corporate character. And the judgment of the Court was confined to that." Simpson, app., Wilkinson, resp., therefore, can have no application here. In Heath, app., Haynes, resp., 3 C. B. N. S. 389 (E. C. L. R. vol. 91), K. & G. 99, the inmates of the Earl of Leicester's Hospital,—a charity regulated by a private Act of Parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had
*32] the exclusive use. The appointment *was for life, subject to removal for breach of any of the rules. The Court held that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered. There, as here, the legal and equitable interest was in the trustees.

Mellish, in reply.—This charity appears to have been founded in or about the year 1692, under what circumstances is not now known. In 1762, when the deed referred to in the case was made, some additional lands were probably given to the hospital: but there is no resulting trust in the Duke, nor any reservation enabling him to deal with the funds at all. The whole profits of the land are to be devoted to the objects of the Duke's bounty: and the case finds that since the year 1778 the entire rents have been so distributed: and the presumption is that that was done in conformity with the deed. The general nature of deeds of this kind was considered in The Attorney-General *v.* The Drapers' Company, 2 Beavan 508. Lord Langdale, M. R., there says, that, "in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention

(*a*) Lands?

of the testator can be collected." In Ashmore, app., Lees, resp., there was an express provision that the trustees were to apply the surplus revenues in a particular way, viz., by increasing the number of pensioners. The decision in that case, therefore, is strictly in accordance with that of Davis, app., Waddington, resp. [KEATING, J.—Do you find any case where a gift of land to trustees upon trust to receive the rents and profits and pay 10*l.* a year to A. B., has been held to give an equitable estate in fee to A. B.?] No.

*ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was right. The qualification of [*33 the parties objected to was in respect of a freehold interest in land in the parish of Bottesford. It appears that a charity called Bottesford Hospital was founded by the Earl of Rutland in or about the year 1692; and that, in 1762, there was a reconveyance of certain lands by the then Duke of Rutland to trustees therein named, who were to hold them in trust to permit and suffer the rectors for the time being in Bottesford and Harly to receive the rents and profits, and to appropriate the same in making certain payments to each of fourteen poor men who then were or thereafter should be admitted into and placed in the hospital,—10*s.* 8*d.* per month, 2*s.* a year for pye-money, 10*d.* a year in lieu of capon-money, 1*s.* a year for salt, and 10*d.* a year for candles,—besides certain allowances for clothing, fuel, and attendance, and so on. The legal estate is in the trustees, upon trust to allow the rectors of the two parishes named to receive the rents and to appropriate them to the extent described and in the manner mentioned. The deed is silent as to the disposal of the surplus rents after satisfying those claims; and there is nothing to warrant the inference that they are to be appropriated to the inmates of the hospital. These fourteen persons insist that they have a freehold interest in the lands. Legal interest they clearly have not. Nor have they any equitable estate in the land. All they are entitled to, is, to receive certain payments out of the profits of the land by the hands of the trustees. Looking to the deed as set out in the case, I see no sign of an equitable interest in the land in these persons: and to qualify them to vote they must at least have that. In Freeman, app., Gainsford, resp., 11 C. B. N. S. 68 (E. C. L. R. vol. 103), K. & G. 448, the parties also claimed to have equitable *freeholds in the chambers which [*34 they occupied: but the Court held otherwise. I am reported to have said on that occasion,—"It seems to me that the inmate is elected as a mere object of charity; and that, when the governor assigns him rooms for his residence, he does not confer upon him any estate which he could enforce by bill in equity." And my Brother Williams said: "The language of the constitutions simply is, that the accommodation for the recipients of the charity shall be regulated in a certain way. They are to take for their lives, subject to removal for any of the offences specified. But it does not therefore follow that the particular rooms are to be assigned to each of them as owner for his life. It seems to me to be clear that he has not the right of an equitable owner at all. If he had, although the purposes of the charity might require him to be removed to another set of rooms, he might set the governor at defiance. It is quite manifest that no such state of things as that could have been intended." So here, I take it to be clear that

all that these poor men have, is, a right to ask for certain money payments and allowances from the trustees; and that they cannot be said to have any equitable estate in the lands.

BYLES, J.—I am of the same opinion. To entitle the party to have his name retained upon the list of voters, he must show that he is seised of an estate of freehold. It is not necessary that it should be a *legal* interest: it is enough if he has an *equitable* estate of freehold. This is not the case of a simple trust to receive the rents and profits for the cestuis que trust, or to permit and suffer them to receive them: but the trustees are to receive the rents and profits, and to expend and allot a portion of them in a particular manner among the
*35] inmates of the hospital. That alone is *enough to prevent those persons taking an equitable interest in the land. But the case goes further. Mr. *Mellish* concedes that he must avail himself of the surplus rents, in order to constitute a sufficient value. But, without deciding that the trustees take the surplus rents in trust (as to which I express no opinion), it is clear that no power is conferred upon them by the deed to dispose of them to any prescribed person or in any prescribed manner. All they could do would be, to dispose of them to and among such persons and in such manner as the Court of Chancery might sanction or direct. For these reasons, although I at one period entertained some doubt, I entertain no doubt now that these persons have not such an interest in the lands in question as to entitle them to the franchise. Upon the authority of Freeman, app., Gainsford, resp., and particularly of the judgments of my Lord and my Brother Williams in that case, I think the revising barrister rightly held that these persons were not entitled to be upon the register.

KEATING, J.—I am of the same opinion. It is, I think, clear from the statements in this case that the claimants are only entitled to claim certain money payments from the trustees who take the interest in the lands, and that they (the claimants) have no equitable estate in the land, and therefore no estate of freehold such as is necessary to give them the franchise. Decision affirmed, with costs.

---

*36] *NORTHAMPTONSHIRE.—Northern Division.

THOMAS NICOLLS ROBERTS, Appellant; ANDREW PERCIVAL, Respondent. *Nov.* 19.

1. Although the decisions of the Court of Common Pleas upon cases stated by revising barristers under the 6 & 7 Vict. c. 18 are by the 66th section of that statute declared to be "final and conclusive in the case upon the point of law adjudicated upon," it is nevertheless competent to the revising barrister upon a future occasion, and between other parties, again to raise the question, even in relation to the same property qualification.

2. Burleigh Hospital, a charitable foundation for a certain number of poor men called bedesmen, was endowed prior to the statute 29 Eliz. c. 5 (an act for the incorporation of public charities), and was governed by certain rules or ordinances which referred to "the feoffees and their heirs," who by lapse of time had been altogether lost sight of. The bedesmen were appointed for life, each on his appointment having a room in the hospital specially assigned to him, and which was found to be of the annual value of 4*l*. The bedesmen were by the ordinances declared to be subject to expulsion for certain offences; but no instance of expulsion had ever been known. There was a warden, who with the bedesmen managed the property belonging to the hospital, letting a portion of it and dividing the rent between them: and, on

the occasion of a railway company requiring a portion of the land, the warden and bedesmen executed the conveyance, and received the purchase-money, which they expended in improving the hospital premises for their mutual benefit.

Held,—upon the authority of Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168, and distinguishing it from Heartley, app., Banks, resp., 5 C. B. N. S. 40, K. & G. 219, and Freeman, app., Gainsford, resp., 11 C. B. N. S. 68, K. & G. 448,—that each of the bedesmen had an equitable estate of freehold in the room occupied by him, in respect of which he was entitled to be registered for the county.

1. THOMAS WADDINGTON, of Kettering, in the county of Northampton, on the register of voters for the parish of Kettering, in the northern division of the said county, duly objected to the vote of Abraham Bell. The name and description of the voter on the register was as follows:—

Bell, Abraham.	**Lord Burghley's Hospital, Saint Martin's, Stamford Baron.**	**Freehold tenement or room.**	**Abraham Bell, occupier.**

2. He also objected to the names of twelve other persons whose qualifications on the list were described in like manner, and depended on the like facts: and the appeals were therefore consolidated.

3. The facts as to the appointment of the several claimants, and the nature and mode of enjoyment of the qualifying property, are similar to the facts as *stated in the case of Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. [*37
168: and the facts of that case are admitted and are to be taken, mutatis mutandis, as if stated as part of this case; as is also the copy of the ordinances printed in such reports.

4. Upon the objections being called on, it was contended on the behalf of the respondent that the revising barrister had no power to enter upon the inquiry, according to the 66th section of the 6 & 7 Vict. c. 18, the judgment of this Court having been given upon facts similar to those which are the foundation of the present claim.

5. The whole of the claimants in the present case had been appointed since the above judgment was delivered.

6. The revising barrister decided to go into the case, and to hear the evidence; being of opinion that the words "the case" in the 66th section referred only to the current register, or at any rate to the particular individual affected.

7. If the Court should be of opinion that this contention should have prevailed, the names were to be retained, without reference to the remainder of the case.

8. The following additional facts were then proved: That, in the year 1846, part of the hospital premises not separately used by the then occupiers was sold to the Midland Railway Company for the purposes of a railway; that the sale was conducted by the then warden and bedesmen, as owners, without the intervention of any other person; that the warden and each of the bedesmen signed the conveyance to the company; and that the money was paid to the warden and bedesmen, and expended by them in erecting buildings upon part of the garden attached to the *hospital, which buildings are now used for a washhouse by the warden and bedesmen, as they [*38
have occasion.

9. It was then contended by the objector,—that, assuming the legal origin of the foundation, if the claimants had any estate, it was only as members of a corporation aggregate, and that the additional facts above stated led to this conclusion; that they had no freehold estate; that, if they had, it was only a joint tenancy in the whole hospital, and not an exclusive and separate one in each of the rooms, and that this also appeared from the new facts; that they were in the receipt of alms; and that, looking at the recent decisions, and especially at Freeman, app., Gainsford, resp., 11 C. B. N. S. 68 (E. C. L. R. vol. 103), K. & G. 448, the claims were bad.

10. The revising barrister overruled these objections, and retained the several names on the list of voters; being of opinion that the facts were substantially unaltered, and that therefore there was nothing to disentitle the claimants to the benefit of the judgment already given by this court upon the same foundation, whatever were the reasons of such decision; and also that they did not receive alms, within the meaning of the 36th section of the 2 W. 4, c. 45.

Hannen (with whom was *Underdown*), for the appellant.—The first question is, whether the revising barrister had any power to go into the case, after the decision of this court in Simpson, app., Wilkinson, resp. The contention that he had not rests upon the 66th section of the 6 & 7 Vict. c. 18, which enacts that "every judgment or decision of the said Court [of Common Pleas] shall be final and conclusive *in the case* upon the point of law adjudicated upon, and shall be binding upon every committee of the House of Commons appointed for the *39] trial of any petition *complaining of an undue election or return of any member or members to serve in Parliament." That clearly means that the decision shall be conclusive only in the case in which it is pronounced. [The Court here intimated their acquiescence in this argument.]

The first question then is, whether these claimants have a freehold interest for life, within the 18th section of the Reform Act. The claim put forward here is, that the inmates of this hospital have an equitable estate of freehold in the rooms they occupy. The point is not concluded by the decision of the Court in Simpson, app., Wilkinson, resp. The Court upon that occasion felt itself to be hampered by the way in which the case was stated by the revising barrister: and, when the counsel for the appellant came to consider what was the effect of the eleemosynary character of the gift, he was stopped by the Court, because the point had not been raised before the revising barrister. And, in giving judgment, Tindal, C. J., says: "It appears to me that the only question open to us in this case, is, whether the revising barrister was wrong in law, in presuming a legal commencement to the estate of these bedesmen. I think his decision was right, and that the facts fairly warranted him to presume,—which was all that was necessary,—that the estate existed by virtue of the Queen's license before the passing of the 29 Eliz. c. 5." The question here is, whether the circumstances do not prevent these persons being equitable owners. Dealing with that case in Freeman, app., Gainsford, resp., 11 C. B. N. S. 68, 91 (E. C. L. R. vol. 103), K. & G. 448, Erle, C. J., says: "The question submitted for the opinion of the Court in that case, was, not whether the claimants had an equitable freehold in

the rooms allotted to them, but whether the revising barrister was right in holding that a legal *foundation might be presumed, not necessarily investing the claimants with a corporate character. [*40 And the judgment of the Court is confined to that. That which is represented to have been said by Maule, J., if correctly reported, was clearly extrajudicial. But, be that as it may, the adjudication was upon the other point only." The character of the holding in Freeman, app., Gainsford, resp., where the parties were held to have no estate, is not substantially different from that in the present case. In the case of the military knights of Windsor,—Heartley, app., Banks, resp., 5 C. B. N. S. 40, 57 (E. C. L. R. vol. 94), K. & G. 219,—Cockburn, C. J., delivering the judgment of the court, says: "It appears to us, that, if we were to hold that the occupation of a residence as part of the benefits of such a charity was an occupation as owner, we must say that any occupation of a separate residence in an almshouse, where the appointment by the grant of the founder is during good behaviour, would be a freehold occupation as owner, and, consequently, if of sufficient value, would give a right to vote,—a conclusion to which we are certainly not prepared to come." Speaking of Simpson, app., Wilkinson, resp., he adds: "That is a very different case from the present. In that case, no trustees were to be found. The recipients of the charity had the direct and uncontrolled management of the property in their own hands: and the only question raised in the case was, whether the revising barrister was right in presuming a legal commencement of the estate of the bedesmen by the royal license, prior to the passing of the 39 Eliz. c. 5. There is nothing in the authority of that case which precludes us from fully considering in this whether the occupation of their houses by the military knights is an occupation as owners." The result of the decisions seems to be this, that, in order to judge what is the *character of the holding, and see whether or not it amounts to an ownership, regard must be had to the general character of [*41 the institution of which the inmates are permitted to receive the benefits. Upon reference to the ordinances set out in the report of the case of Simpson, app., Wilkinson, resp., it is manifest that these parties have no legal estate, but that their holding is altogether of an eleemosynary character. Reliance will probably be placed on the 21st of these ordinances, which provides, that, "as these poor men shall have at the first their several rooms allowed them in the almshouse, so shall they during their lives or their continuance in their places continue their lodging, and every one as he shall succeed to the void places, so shall he succeed in the lodgings without any change," as giving a somewhat more permanent character to the holding than in some of the other cases: but it is to be observed that that is to be found amongst the rules for the internal government of the institution. The observations of Williams, J., in Freeman, app., Gainsford, resp., would have been equally applicable in the case of Simpson, app., Wilkinson, resp. [ERLE, C. J.—In Freeman, app., Gainsford, resp., the surplus revenues of the hospital were vested in the trustees for the purpose of enlarging the charity and adding to the number of the inmates. The trustees were clothed with active trusts, and had a general control over the funds of the hospital, the

inmates merely occupying the rooms as recipients of the benefits of the charity. That is a very different thing from having an equitable estate in the lands. In Simpson, app., Wilkinson, resp., the warden and bedesmen act as absolute owners, letting a portion of the building, and dividing the rent amongst them.] That arose from the circumstances of the heirs of the feoffees being unknown. [ERLE, C. J.—In *42] the case of a lost deed, user *is evidence of its contents.] We have here the ordinances, which show the precise position of the inmates, which does not differ from that of the parties in Heartley, app., Banks, resp., and Freeman, app., Gainsford, resp. The circumstances of the inmates receiving the rent for the granary, and disposing of the proceeds of the sale of a portion of the hospital to the railway Company, are fully accounted for by the fact of the feoffees and their heirs being lost sight of. In order to entitle these persons to vote, they must have a freehold interest, legal or equitable, in the rooms they occupy. Looking at the general character of the ordinances by which this charity is regulated, it is clear that the occupation of the rooms by these parties is only as objects of the bounty of the founder, without any scintilla of ownership.

Field, Q. C., contrà, was not called upon.

ERLE, C. J.—I am of opinion that the decision of the revising barrister was right. I was a party to the judgment in Simpson, app., Wilkinson, resp., 7 M. & G. 50 (E. C. L. R. vol. 49), 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168. This Court were then of opinion that the inmates of Burleigh Hospital had a freehold interest in the rooms assigned to them: and I now entertain the same opinion. The origin of the hospital was unknown, and we held that the revising barrister was warranted in inferring from the ordinances and the statute 39 Eliz. c. 5 (referring to a former statute of 35 Eliz. c. 7), that it had been founded by Lord Burleigh under license from the Crown, and endowed with a grant of lands to trustees or feoffees in trust for the use of the bedesmen. It seems to me that the interest of the inmates under such an endowment, if it stood there, would have been an *43] equitable freehold in the property, the legal estate being in *the trustees, just as, if incorporated under the 39 Eliz. c. 5, the legal estate would be vested in the corporation,—except that in that case the members of the corporation would acquire no right to vote. The difference consists in this. Members of a corporation aggregate are not qualified to vote, because the interest in the property is vested in the corporation: and that is the way in which by far the larger portion of these hospitals are endowed. But, if the lands are conveyed to feoffees in trust for the members, the legal estate would be in the feoffees, and the equitable interest would be in the members of the institution according to the terms of the deed. Where the deed is lost, the terms of it would be to be presumed from the manner in which the property had been enjoyed. Now, the property belonging to Burleigh Hospital has been dealt with in a way that is consistent with the supposition which I have put forward. Each member when elected was placed in a certain room for life. The property of the hospital was managed by the warden and bedesmen as the legal owners, without interference by any one. There had been feoffees, but they were unknown. The warden and bedesmen let a portion of

the hospital which was not required for their own use, acting in every way as persons having the equitable freehold and beneficial interest in the premises. And then we have here the additional fact, that, when a portion of the hospital premises was sold to the Midland Railway Company, the warden and bedesmen executed the conveyance, and received the purchase-money and applied it to their own use. There is, therefore, ground for inferring that the legal estate was originally in the feoffees: but there was abundant evidence from the mode of user to authorize the Court in holding that each of the bedesmen took a separate equitable freehold in the room assigned to him, the rest of the *beneficial interest in the property of the hospital being in the warden and bedesmen in the way I have already pointed out. [*44

There is, no doubt, much in the language of the ordinances set out in the reports to imply a supervision and control interfering in some degree with the rights of property I have assumed. But there is not anything very distinct. For instance, the 11th article provides that the bedesmen shall for certain irregularities of conduct be "displaced by them by whose authority they were placed." But, little reliance can be placed on that, seeing that it seems never to have been acted upon; and, if any attempt were now made to act upon it, there would probably be found abundant difficulty in so doing. I do not, upon the whole, think that the existence of that power of amotion shows that the Court were wrong in holding in Simpson, app., Wilkinson, resp., that the inmates of this hospital took each an equitable freehold interest in his room, and so were qualified to be registered.

The strength of Mr. *Hannen's* argument was, that this Court in Heartley, app., Banks, resp., 5 C. B. N. S. 40 (E. C. L. R. vol. 94), K. & G. 219, held that "the poor knights of Windsor," and in Freeman, app., Gainsford, resp., 11 C. B. N. S. 68 (E. C. L. R. vol. 103), K. & G. 448, that the inmates of Shrewsbury Hospital had no such estate or interest in the houses or rooms occupied by them as to entitle them to be registered, though they were entitled to a share in the revenues of the respective charities. But the broad and marked distinction in my mind between those cases and the present is this, that, in each of those cases, there was a governing body, in whom the legal estate was vested, and in whom it necessarily continued vested for the performance of active trusts, and the property did not belong absolutely and beneficially to the persons who claimed to be registered in *respect of it. In Heartley, app., Banks, resp., the trustees, the dean and canons of Windsor, received the rents and profits, and the poor knights received each a given portion of money out of the fund, and were allowed to occupy a house. So, in the case of Shrewsbury Hospital (Freeman, app., Gainsford, resp.), the inmates were entitled to a certain portion of money out of the general fund, without having any estate, though the trustees were bound to find them a lodging. In the case of the Burleigh Hospital, the inmates were by the 21st article of the Ordinances to continue in their rooms for life. In Freeman, app., Gainsford, resp., they took no estate in their respective rooms: and the court assumed that the governing body had power to shift them from time to time as they pleased, and would perform their duty by assigning them *any* room in the hospital [*45

for a residence,—which was altogether irreconcileable with a freehold interest, as in the case of Lord Burleigh's Hospital. In this case, the legal estate is in the feoffees, who would have been a corporation if created after the 39 Eliz. c. 5, and the equitable interest was in the warden and bedesmen. In Heartley, app., Banks, resp., and in Freeman, app., Gainsford, resp., the trustees took the whole legal and equitable estate, subject to the disposal of the proceeds in the way already mentioned.

A degree of unnecessary ambiguity has been introduced into these cases by assuming that the parties, though taking a freehold interest, legal or equitable, would be disqualified from voting if the occupation were of an eleemosynary character. I have a great desire to avoid introducing as a ground of decision that which to my mind is altogether a mistaken notion. In deciding whether or not a party has an equitable title, it may be material to look at the mode in which *46] the proceeds of the property are applied, to *see whether the trustees are doling out the bounty of the grantor to those who are the objects of his charity. But, if a man has a freehold estate, legal or equitable, it matters not that the motives of the grantor were of a charitable or benevolent nature, or that the feelings of the grantee should be those of gratitude for an eleemosynary gift. The motives and feelings of neither grantor nor grantee can be permitted to weigh when we are deciding whether or not the grantee took an estate. They are absolutely irrelevant, except to the extent I have already intimated. All we have to look at, is, what the trustees have to do. If they hold the legal estate in trust to receive the profits and pay certain allowances to the inmates, and the latter take nothing but an interest in those allowances, no qualification is created. There is nothing in the Reform Act to show that the acquisition of an estate through the benevolence of the grantor interferes with the right to vote.

BYLES, J., was engaged in the Central Criminal Court.

KEATING, J.—I concur with my Lord in thinking that the decision of the revising barrister was right. Mr. *Hannen* asks us to reconsider the decision which the Court came to in Simpson, app., Wilkinson, resp., on the ground that the Court has in the subsequent cases of Heartley, app., Banks, resp., and Freeman, app., Gainsford, resp., laid down principles which, though they do not absolutely conflict with those upon which the former case rests, might have induced the Court to come to a different conclusion. He has, however, failed in showing identity of circumstances between the case of Simpson, app., Wilkinson, resp., and the two later cases. One important distinction *47] *has been adverted to by the Chief Justice, viz., that, in Heartley, app., Banks, resp., and Freeman, app., Gainsford, resp., the property was vested in trustees, who had active trusts to perform, and the donees or recipients of the charity took nothing which amounted to an equitable estate in any particular land; whereas, in Simpson, app., Wilkinson, resp., there is no such intervening body, but the management of the property has from the beginning been vested in the claimants themselves. They have let a portion of the property, dividing the proceeds amongst them as joint-tenants. They deal with their respective rooms as their separate and exclusive property. And,

when a portion of the hospital property is wanted by a railway Company, they all join in the conveyance, and they expend the purchase-money in improvements in the building for their mutual convenience,—no trustee or feoffee or other person interfering in any way with their proceedings. Under these circumstances, it seems to me that the inmates in the two cases relied on had no equitable estate at all in respect of which they could claim to be registered, but that, in Simpson, app., Wilkinson, resp., they had.

Decision affirmed, with costs.

---

*County of OXFORD. [*48

THOMAS NICOLLS ROBERTS, Appellant; RICHARD DREWITT, Respondent. *Nov.* 19.

1. The appointment of a parish clerk need not be by deed.
2. A parish clerk by virtue of his appointment was entitled to a twelfth share of twenty-six acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as he continued clerk, and his predecessors in the office has always enjoyed the same:—Held, that the clerk had a freehold interest in his share, in respect of which he was entitled to be registered.

1. The respondent's name was inserted in the list of voters of the parish of Marston, in the county of Oxford, as follows,—

Christian and surname.	Place of abode.	Nature of qualification.	Street, lane, &c., where situate, &c.
Drewitt, Richard.	Marston, Oxon.	Freehold office of parish-clerk.	Marston.

2. At the Court held to revise the lists of voters for the said county of Oxford, the name of the said Richard Drewitt was duly objected to.

3. It was proved that he was duly appointed parish-clerk of the parish of Marston by the vicar thereof; and that he had held and performed the duties of such office of parish-clerk for thirty years: but there was no proof of appointment by deed.

4. By virtue of his said office of parish clerk, he was entitled to one twelfth part or share in twenty-six acres of freehold land situate in the said parish, and known by the name of Bushy Land, so long as he continued parish clerk. The yearly value of the said one twelfth part or share was 40*s.*; and it was let by him for that sum.

5. It was further proved that his predecessors in the said office of parish clerk had always been entitled to and had received and enjoyed the said one-twelfth part or share; and that he had received and enjoyed the same ever since his appointment; and that the *right thereto of the parish-clerk of Marston for the time being [*49 was fixed and certain.

6. The only other evidence which could be furnished as to the original title of the parish clerk of Marston to the above-mentioned one twelfth share in the said land, was, an extract from the report of the charity Commissioners relating to the said parish, bearing date

the 9th of July, 1824, as follows,—"There is in this parish a piece of bushy land, containing about twenty-six acres, on which twelve of the poor men have a right of common for a cow. We could not discover the origin of this right: and it is doubtful whether it can be referred to any charitable foundation. These twelve cow-commons are however always enjoyed by twelve poor persons, of whom the parish clerk is one." There was no evidence of any election of the said Richard Drewitt as one of such twelve poor men.

7. It was contended by the appellant, upon this state of facts, that the said Richard Drewitt took no freehold interest in his one twelfth part or share in the said twenty-six acres of land, and that the same was eleemosynary; and that, even if his interest therein were freehold, yet the same was not of sufficient yearly value to entitle him to be registered, as the calling of "parish clerk" is not an *office* within the meaning of the exception in the 18th section of the 2 W. 4, c. 45; and, consequently, that, to entitle him to be registered on the said list, his one twelfth part or share in the said twenty-six acres of land must be of the annual value of 10*l.*: and, further, that the appointment of parish clerk must be by deed.

8. The revising barrister decided, that, on these facts, the said Richard Drewitt did take a freehold interest in his one twelfth part or share in the said land, and that "parish clerk" was an "office" *50] within *the said 18th section: and accordingly he retained his name in the said list of voters, and amended the third column of the said list to "Freehold land, in right of office," and the fourth column to "Parish clerk of Marston. Bushy land."

9. The questions for the opinion of the Court were, first,—whether the said Richard Drewitt had a freehold interest in his said one twelfth part or share of the said land,—secondly, whether the calling of "parish clerk" was an *office* within the meaning of the exception in the said 18th section of the said act,—and thirdly, whether a person can be appointed to such office otherwise than by deed.

10. If the Court should be of opinion that the respondent took a freehold interest in respect of his said share, and that "parish clerk" is an *office* within the meaning of the said 18th section, and also that the appointment thereto need not be by deed, the list was to stand without amendment. But, if the Court should be of a contrary opinion on either of these points, the said list was to be amended by expunging therefrom the name of the said respondent.

Hannen, for the appellant.—The question in this case arises upon the 18th section of the Reform Act, which enacts that "no person shall be entitled to vote in the election of a knight of the shire to serve in any future Parliament, or in the election of a member or members to serve in any future Parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands and tenements, or except the same shall have come to such person by marriage, marriage *51] settlement, devise, or promotion to any benefice or *to any office*, or except *the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect

of the same," &c. It cannot be contended that the appointment to the office of parish clerk need be by deed: and, as to its being an appointment to an "office," the subject underwent consideration in Bushell, app., Eastes, resp., 11 C. B. N. S. 106 (E. C. L. R. vol. 103). There, A. was in 1826 appointed parish clerk of St. James, Dover; and by license under the seal of the Archbishop of Canterbury, dated in 1832, he was confirmed in his office, "together with all and singular the fees, salaries, and profits either by law or ancient custom belonging to the same." Part of the emoluments attached to the office consisted of the clerk's share of an ancient due payable to the clerk and sexton upon the opening of every grave in the churchyard of the parish; and this exceeded 40*s.* a year. The parish clerk had not himself to perform any of the work of or incident to the opening of the graves, this being done by the sexton. The revising barrister held that the ancient fee was in the nature of a remuneration for services rendered in conducting the funeral rites, and not a payment or emolument issuing out of or charged upon any land, and therefore that the parish clerk was not entitled to be registered. The Court held that his decision was right. The real question here is, whether this person has a freehold interest in land within the statute. [BYLES, J.—We cannot enter into a question of title.] If the revising barrister meant to find that Mr. Drewitt had title to the land, there is nothing to argue. [BYLES, J.—He finds that he is entitled to it so long as he holds the office of parish clerk, that his predecessors in the office have always enjoyed it, and that nobody has ever interfered with them.]

Rew, for the respondent, was not called upon.

*ERLE, C. J.—We must presume that what has been done has been rightly done. If it was impossible for this person to have a freehold in the land, no doubt Mr. *Hannen's* argument must prevail. But there is nothing in the case to warrant us in coming to that conclusion. [*52

The rest of the Court concurring,

Decision affirmed, with costs.

Borough of TAUNTON.

GEORGE BAKER, Appellant; THOMAS LOCKE, Respondent.

Nov. 19.

1. *Quære*, whether a poor-rate, one of the persons necessarily constituting the majority in the making of which was an *assistant overseer*, is valid?

2. In the parish of T. there were two churchwardens and four overseers, and an assistant overseer who was appointed "to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseer of the said parish, except the collection of rates." A rate was made by the two churchwardens, one overseer, and the assistant overseer, and was allowed by two justices, and duly published and not appealed against:—

Held, that, the rate being apparently good upon the face of it, the non-payment of it disqualified a party from being placed upon the borough list of voters.

1. AT the Court held to revise the list of voters for the borough of Taunton, Thomas Locke duly objected to the name of George

Baker and those of nine other persons. The names of the parties objected to appeared in the list, as follows:—

Christian name and surname of each voter.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Baker, George.	Bridge Street.	House and shops.	Bridge Street.
Baker, James.	Obridge.	House.	Obridge.
Baxter, John.	Black Horse Lane.	House and shop.	Black Horse Lane.
Biss, William.	Bridge Street.	House.	Bridge Street.
Burford, James.	Bridge Street.	House.	Bridge Street.
Kallend, James.	Yarde Street.	House.	Yarde Street.
Warren, William.	Bridge Street.	House.	Bridge Street.
Warren, William.	Northtown.	House and garden.	Northtown.
Whiterham, F. D. S.	No. 5, Harmony Row.	House.	5 Harmony Row.
Woodland, William.	Yarde Estate, Bridge St.	House and premises.	Yarde Estate, Bridge St.

*53] *2. The facts in the case of George Baker proved before the revising barrister were as follows:—George Baker occupied as tenant premises within the said borough, in the parish of Taunton St. James, of sufficient value and for a sufficient time to entitle him to a vote for the said borough under the 2 W. 4, c. 45, s. 27, subject to the following question as to his non-payment of rates,—

3. During the period of his occupation required by law to entitle him to a vote, a poor-rate for the said parish was made and signed by an overseer of the said parish, and also by the two churchwardens, and by the assistant overseer thereof. The rate was allowed and confirmed at Taunton by two magistrates for the county of Somerset, who in the usual form appended their joint signatures to a certificate of allowance immediately following in the rate-book the signatures of the overseer, assistant overseer, and churchwardens; but, in point of fact, the signatures of the two magistrates to the allowance were obtained on the same day in Taunton, and separately.

4. The rate was duly published the day after it was allowed: and in the said rate George Baker was rated in respect of the premises he occupied; and, on its being demanded, he did not pay and has not paid the said rate. The rate was not appealed against, and the time for appeal has now expired: and the rate has been generally paid.

5. There are four overseers appointed for the said parish. The assistant overseer is appointed under the 59 G. 3, c. 12, s. 7, and his appointment in its material parts is as follows:—

"Poor Law. Assistant Overseer. Appointment.

"59 G. 3, c. 12, s. 7; 7 & 8 Vict. c. 101, s. 61.

"County of Somerset. Whereas, the inhabitants of the parish of *54] Taunton St. James, in the said county of *Somerset, in vestry assembled in the said parish on the 8th day of April last, elected and nominated Walter Chorley Brannan, of Taunton St. James aforesaid, accomptant, to be assistant overseer of the poor of the said parish of Taunton St. James, and did determine that the duties to be by him executed and performed should be, to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseers of the said parish (except the collection of rates), and that his salary for the execution of the said office should

be 10*l.* yearly, to be paid quarterly. Now, we do appoint the said Walter Chorley Brannan to be assistant overseer of the poor of the said parish of Taunton St. James, to execute and perform the duties above referred to, and at the salary fixed as aforesaid.

"Given under the hands and seals," &c.

6. The assistant overseer was also duly appointed collector of rates by the board of guardians.

7. It was contended on behalf of George Baker, that the said rate was void, on the ground that it was not signed by a majority of the parish officers, and that consequently its non-payment by George Baker did not invalidate his right to be retained on the list of voters for the said borough.

8. The revising barrister was of opinion that the rate had been signed by a majority of the parish officers; but that, at all events, having been signed as above described, allowed, and published, it was while unappealed against a rate which must have been paid by George Baker to entitle him to a vote under the 27th section of the Reform Act; and he accordingly expunged his name from the list of voters.

9. He also expunged from the said list the other nine names above written: and, as the facts in each of those cases were the same as those above stated in reference *to George Baker, and raised the same point of law, he declared that they should be all consolidated with the principal case. [*55

10. If his decision in the case of George Baker was right, the list as revised by him was to remain unaltered: but, if it was wrong, then the name of George Baker and the other nine names above written were to be reinstated in the list.

Hannen (with whom was *Underdown*), for the appellant.—A voter is not disqualified by non-payment of a void rate, which, it is submitted, the rate in question is, it not having been made by "the greater number" of the churchwardens and overseers of the poor of the parish, as required by the 43 Eliz. c. 2, s. 3. It appears, that, in the parish of Taunton St. James, there are two churchwardens and four overseers, and that there is also an assistant overseer; and that the rate in question was signed by the two churchwardens and one overseer, and by the *assistant overseer*. It is submitted that the assistant overseer has no authority to make a rate. The statute authorizing the appointment of an assistant overseer is the 59 G. 3, c. 12, s. 7, which provides, amongst other things, that, "every person to be so appointed assistant overseer shall be and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." That obviously means that he shall act as the deputy or servant of the overseers: and that is borne out by the 61st section of the 7 & 8 Vict. c. 101, which enacts that "every assistant overseer appointed or hereafter to be appointed in pursuance of the said Act of 59 G. 3, c. 12, shall, subject to the rules of the poor-law commissioners, *obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers* of the parish for which he acts." How is it consistent with this

enactment that his vote should override the judgment of three of the four overseers? [BYLES, J.—He relies upon the express words of the 59 G. 3, c. 12, "in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor."] That is the case with every agent: but it never could have been intended to enable the assistant overseer to control the overseers, or to enlarge his own powers in this way. In a note appended to the form of a poor-rate order, in Glen's Poor Law Board Orders, p. 393, it is said, that, "under the 43 Eliz. c. 2, it is necessary that an actual majority of the churchwardens and overseers should sign the rate; and the necessity of their doing so is in no way lessened by there being an assistant overseer appointed to discharge all the duties of an overseer. There is, however, nothing to prevent the assistant overseer signing it; *but his signature will have no legal effect.*" Bennett *v.* Edwards, 8 B. & C. 702 (E. C. L. R. vol. 15), 1 M. & R. 482 (E. C. L. R. vol. 17),(*a*) is a distinct authority to show that an assistant overseer is not an overseer *for all purposes.* If this objection be a valid one, the rate is void: and the non-payment of a void rate does not disqualify a party from being placed upon the register: Fox, app., Davies, resp., 6 C. B. 11, 2 Lutw. Reg. Cas. 97.

Prideaux, for the respondent.—The rate in question is valid. If the 7 & 8 Vict. c. 101 had not been passed, the case would have been free from doubt. By the 59 G. 3, c. 12, s. 7, the duties to be performed by the assistant overseer are to be specified in the warrant under which he is appointed; and the person so *appointed is *57] authorized and empowered to execute all such of the duties of the office of overseer, "in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor." Here, Brannan was by the terms of the warrant under which he was appointed "to assist the overseers of the poor of the said parish in the performance of *all the duties incident to the office of overseers* of the said parish, except the collection of rates:" and he was afterwards appointed to perform that duty also. He clearly, therefore, was competent to perform the duty of making a rate. In The Queen *v.* Watts, 7 Ad. & E. 461 (E. C. L. R. vol. 34), 2 N. & P. 367, where the question was whether an appeal lay against the accounts of an assistant overseer, Lord Denman says: "We see no reason to doubt that an assistant overseer's account may be the subject of an appeal. *He is not the servant of the churchwardens and overseers* of the parish, but of the vestry, from whom he directly receives his authority; an authority which may indeed be limited by the warrant of appointment, but which does not appear to have been limited in the present case." It is clear, therefore, that, before the 7 & 8 Vict. c. 101, the assistant overseer was an independent officer, deriving none of his authority from the churchwardens and overseers. [BYLES, J. —Could he be displaced without a vote of the vestry?] No: that is expressly provided by the 59 G. 3, c. 12, s. 7. In Points, app., Attwood, resp., 6 C. B. 38 (E. C. L. R. vol. 69), 2 Lutw. Reg. Cas. 117, the service of a notice of objection upon an assistant overseer was held to be a good service within the 6 & 7 Vict. c. 18, s. 17. Coltman, J., in delivering the judgment of the Court, there says: "On

(*a*) In error, 3 Y. & J. 458,† 6 Bingh 230 (E. C. L. R. vol. 19), 3 M. & P. 749.

the facts stated in this case it must be understood that Cooper had been appointed pursuant to the statute 59 G. 3, c. 12; and, as there is no limitation of the duties which he is to *perform, but the appointment is general in its terms, he must be taken to have been appointed to perform all the duties of an overseer: for which the case of Skingley *v.* Surridge, 11 M. & W. 503,† is an authority. Now, such an officer, as was stated by Lord Denman, in delivering the judgment of the Court in The Queen *v.* Watts, is not the servant of the churchwardens and overseers, but of the vestry, from whom he directly receives his authority. The acts done by him are not, therefore, to be considered as done by him as the agent of the other overseers, but as done by virtue of his own authority derived from the appointment of the vestry." All the arguments urged here would have been equally applicable there. Parke, B., in his judgment in Skingley *v.* Surridge, assumes that a general appointment would give the party appointed "all the powers and duties of a principal overseer." In Caunter, app., Addams, resp., 15 C. B. N. S. 512 (E. C. L. R. vol. 109), 1 Hopw. & Ph. 60, service of a notice of claim upon an assistant overseer was held a good service under the 30th section of the Reform Act. These authorities clearly show, that, before the passing of the 7 & 8 Vict. c. 101, an assistant overseer was a party deriving independent authority by virtue of his appointment by the vestry and the confirmation thereof by the justices, and was not the servant or agent of the overseers. Then, is the character of that officer in any degree altered by the words of the 7 & 8 Vict. c. 101, s. 61, which require him to obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers? It is submitted that it is not. So material an alteration of his status would not have been made by the Legislature except by plain and express words. [*58

Hannen, in reply.—The only authority which at all presses, is the case of Points, app., Atwood, resp., 6 *C. B. 38, 2 Lutw. Reg. Cas. 117, where it was held that an assistant overseer was competent to receive a notice which the statute required to be served upon the overseers: but there the difficulty was removed by the provision in the 101st section of the 6 & 7 Vict. c. 18, that the words "overseers" or "overseers of the poor" shall extend to and mean all persons who by virtue of any office or appointment shall execute the duties of overseers of the poor, by whatever name or title such persons may be called, and in whatsoever manner they may be appointed; and that, wherever any notice is by the Act required to be given or sent to the overseers of any parish or township, it shall be sufficient if such notice shall be delivered to any one of such overseers, &c. [*59

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case, that the claimant was disqualified by reason of the non-payment of the rate in question, was correct. The Legislature has thought fit to make the right to be registered as a voter for a borough to depend upon the party's having paid certain dues,—amongst others, the poor rates,—up to a certain date. It is found as a fact in this case that a poor-rate was made, allowed, and confirmed, and duly published,—but was not paid by the voter. Apparently, therefore he is unqualified. The rate so left unpaid was upon the

face of it a valid rate; and it was not appealed against. It purports to be signed by four persons, viz., two churchwardens, one overseer, and an assistant overseer. The parish has two churchwardens, four overseers, and an assistant overseer: four, therefore, would constitute a majority, as required by the 43 Eliz. c. 2, s. 3. The voter's excuse for non-payment of the rate, is, that one of the persons who signed the rate, and without whose signature there would not be the required
*60] majority, was not qualified to join *in the making of a rate. I do not intend to express any binding opinion as to whether or not a rate so made is a valid rate. It is laid down by Mr. Glen, in his edition of the Poor Law Board Orders, that an assistant overseer cannot legally join in making a rate. But here the assistant overseer has in point of fact joined: and I must say that there is presumably an authority in him so to do under the 59 G. 3, c. 12, s. 7, which enacts that every person appointed assistant overseer under that Act "shall be and he is thereby authorized and empowered to execute all such of the duties of the office of overseer of the poor as should in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same might be executed by any ordinary overseer of the poor." We have before us the warrant under which this person was appointed assistant overseer; and that defines the duties to be performed by him to be "*all* the duties incident to the office of overseers of the said parish, except the collection of rates." Now, the making and signing a rate is one of the duties incident to the office of overseer. It has been contended by Mr. *Hannen* that the assistant overseer is but the servant of the overseers, bound (under the 7 & 8 Vict. c. 101, s. 61) to obey, in all matters relating to the duties of overseer, all directions of the majority of the overseers of the parish for which he acts, and that he cannot act in the place or in opposition to the will of his masters. I do not, however, think the learned counsel is well justified in that contention. Under the 59 G. 3, c. 12, s. 7, he is appointed, and removable by the vestry: and the Court of Queen's Bench in The Queen *v.* Watts, 7 Ad. & E. 461 (E. C. L. R. vol. 34), 2 N. & P. 367, distinctly say that "he is not the servant of the churchwardens and overseers of the parish, but of the
*61] vestry, from whom he directly derives his authority." *There are numerous instances where an assistant overseer is held to be an overseer, and where the acts of the former are held to be the acts of the latter. In many corporations there is a deputy recorder, but he is not in truth the deputy of the recorder, but an independent officer. The statute 7 & 8 Vict. c. 101, s. 61, no doubt, directs that the assistant overseer shall, in all matters relating to the duties of overseer, obey all directions of the majority of the overseers of the parish for which he acts. Still his appointment remains as before. That being so, here is a rate which is apparently valid upon the face of it, and which has been allowed by two justices, and duly published. The observations of Maule, J., in giving judgment in Fox, app., Davies, resp., 6 C. B. 11 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 97, are very much to the purpose. "In allowing a rate," he remarks, "the justices are said to act ministerially: The Queen *v.* The Earl of Yarborough, 12 Ad. & E. 416 (E. C. L. R. vol. 40), 3 P. & D. 491. And probably that is so, in the sense in which the word is used in

some of the cases. But it is quite clear that they may so far act judicially that they may exercise a discretion in judging whether the persons who profess to have made the rate are the proper persons to make it. This was the view taken by the Court of King's Bench in Rex *v.* Folly, 1 Bott's P. L. 86 (6th edit. by Pratt, p. 62). 'On a mandamus to the justices of W. B. to allow a rate, they returned, that, ever since the 43 Eliz. c. 2, the justices had appointed four, three, or two overseers within that part of the parish which lies within *the borough*, and that they had always made rates within their jurisdiction; then they say that the rate was offered to them, made by overseers appointed by justices of *the county*, and not of *the borough*. Per Curiam: The return must be confirmed.' The justices there did exercise a discretion in determining whether the rate had been made by *competent officers: and to that extent their jurisdiction was upheld." Presumably the rate here is a valid one: and I am [*62 clearly of opinion, that, if the claimant wished to try the validity of it, he might have done so by appeal; and, if he had chosen to pay the rate in the mean time, he would have sustained no detriment, because, if it had turned out that the rate was invalid, he would have been allowed that payment on account of the next valid rate. I therefore think the claimant has kept in his pocket money which Parliament required him to pay as a condition of his obtaining a right to be upon the register. And, without deciding whether or not his objection was a sound one, it is enough to say that this rate was presumably a good one and ought to have been paid. I think we should be holding out a very bad precedent if we held a party entitled to be registered who has thus withheld payment of a rate which has not been properly questioned, upon a ground that appears to me to be perfectly indifferent. The poor must be maintained at the expense of those who occupy rateable property in the parish: and we ought not to hold out any encouragement to those who seek to relieve themselves from a burthen which the law has cast upon them, by taking advantage of an objection of mere form. I think, upon the whole, that the revising barrister was right in expunging the names of these persons from the list of voters.

BYLES, J.—I am of the same opinion. The rate in question appears to be perfectly good upon the face of it. It professes to be signed by the proper persons, and to have been allowed by two magistrates, and duly published. The 59 G. 3, c. 12, s. 7, which creates the office of assistant overseer, makes him appointable and removable by the vestry, but says nothing about his *obedience to his fellow- [*63 overseers. It gives him power and authority in the largest terms "to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseeer of the poor." Now, the warrant under which this person was appointed declares that the duties to be by him executed and performed shall be, "to assist the overseers of the poor of the said parish in the performance of *all the duties incident to the office of overseers* of the said parish, except the collection of rates,"—a reasonable exception, seeing that the appointment of collector of the rates did not rest with the vestry. Looking,

therefore, at the 59 G. 3, c. 12, and at the warrant, this person seems to have been invested with the full powers of an overseer. Mr. *Hannen* says he stands in the relation of a servant to the overseers. There is nothing in the language of the statute to warrant that. I should say he rather stands in the position of a coadjutor or fellow-officer. The Court of Queen's Bench in The Queen *v.* Watts, and this Court in Points, app., Attwood, resp., seem to have so held: at least, that appears to me to be the fair result of those two decisions. If the matter had stood there,—without pronouncing any final opinion upon the point,—I must confess I should feel great difficulty in holding this to be a bad rate. I certainly had always understood that the allowance of the rate by the justices was simply a ministerial act. But looking at the case of The King *v.* Folly, to which my Lord has referred, and to the observations of Maule, J. (whose judgments are entitled to the profoundest respect), in Fox, app., Davies, resp., there seems to be good reason for thinking that it is something more. *64] Strangers might not know who are the persons *authorized to make a rate: but the statement of the magistrates authenticating the transaction might well satisfy all persons concerned that the rate was made by persons duly qualified to make it, and to be avoided only on appeal. A man cannot be excused from paying a rate merely because it may be voidable. Almost every rate that is made is voidable. For these reasons, I am unable to say that the revising barrister has come to a wrong conclusion.

KEATING, J.—I entirely agree in the reasons which have been given by my Lord and my Brother Byles. Mr. *Hannen* has relied very much upon the terms of the 7 & 8 Vict. c. 101, s. 61, requiring the assistant overseer to obey in all matters relating to the duties of overseer all directions of the majority of the overseers of the parish for which he acts. But I do not know why we should intend that in signing this rate Brannan did not act in obedience to the directions of the majority of the overseers. Under these circumstances, it is impossible to say that the revising barrister has come to a wrong conclusion.

Prideaux asked for costs on behalf of the respondent.

Hannen, contrà, submitted that the case was one which was fairly arguable, and therefore not a case for costs; more especially as the magistrates had considered the rate of so doubtful validity that they had declined to enforce it.

ERLE, C. J.—I see no reason why the rate should not be paid. There is nothing to take the case out of the general rule, that the respondent succeeding has his costs.

Decision affirmed, with costs.

*Borough of KIDDERMINSTER. [*65

RICHARD POWELL, Appellant; FREDERICK BRADLEY, Respondent. *Nov.* 22.

To entitle a party to be registered under the 2 W. 4, c. 45, s. 27, in respect of the occupation of a house, &c., it is not necessary that he should have been of "full age" during the whole of the prescribed period of occupation.

1. AT a Court held for the revision of the lists of voters for the borough of Kidderminster, Frederick Bradley duly claimed to have his name inserted on the list of persons entitled to vote in the election of a member for the borough of Kidderminster, in respect of the joint occupation of a foundry and premises at Clensmore, in the parish of Kidderminster Borough.

2. The said Richard Powell duly objected to the name of the said Frederick Bradley being inserted in such list of voters.

3. The said foundry and premises were in the joint occupation of Frederick Bradley and his brother Samuel Bradley, for twelve calendar months next previous to the last day of July in the present year.

4. The said Frederick Bradley attained the age of twenty-one years in the month of March in the present year.

5. At the said foundry, the trade or business of iron-founders was carried on under the firm of John Bradley & Co.

6. It was objected, on behalf of the said Richard Powell, that the said Frederick Bradley's name ought not to be inserted in the list of voters for the parish of Kidderminster Borough, inasmuch,—first, that, as the said Frederick Bradley was only twenty-one years of age in March in the present year, he could not have occupied as owner or tenant the said foundry and premises for twelve calendar months previous to the last day of July in the present year,—secondly, that the said Frederick Bradley was not of full age during the *whole of the twelve calendar months previous to the last day of July [*66 in the present year.

7. The revising barrister held that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year: and he also held that the minority of the said Frederick Bradley during a portion of the twelve calendar months previous to the last day of July in the present year did not of itself constitute a disqualification to his name being retained on the list of voters, and he therefore retained his name on the list of voters.

8. If the Court should be of opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did preclude him from occupying the said foundry and premises for twelve calendar months previous to the last day of July in the present year, or that the minority of the said Frederick Bradley during a portion of the twelve months previous to the last day of July in the present year was a disqualification, then the name of the said Frederick Bradley was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the Court should be of

opinion that the said Frederick Bradley's having attained the age of twenty-one years in March last did not preclude him from occupying the said foundry and premises for the time and in manner aforesaid, and that the minority of the said Frederick Bradley during a portion of the said twelve months previous to the last day of July in the present year was not a disqualification, the register of voters was to remain unaltered.

*67] *Keane*, Q. C., for the appellant.—The first point *urged before the revising barrister must be conceded not to be tenable. The second, however, is a point of some importance. At the time of the passing of the Reform Act, the 7 & 8 W. 3, c. 25, the 8th section of which precluded a minor from voting in the election of a member of Parliament, was in force, and is still unrepealed. The words "person of full age" in the 27th section of the Reform Act must be assumed to have been introduced for another purpose. That section enacts that, in every city or borough, &c., *every male person of full age* who shall occupy as owner or tenant any house, &c., of the clear yearly value of not less than 10*l.*, shall, if duly registered, be entitled to vote: provided always that no *such person* shall be so registered in any year, unless he shall have *occupied such premises as aforesaid for twelve calendar months* next previous to the last day of July in such year, &c. Three things must concur to entitle the party to be registered: he must be a *male*, and of *full age*, and "such person" must have occupied the particular tenement for *twelve months*. This section bears a strong analogy to the provision of the Municipal Corporation Reform Act, 5 & 6 W. 4, c. 76, which prohibits an infant from qualifying himself to be a burgess. [ERLE, C. J.—The prohibition is against an infant voting.]

Kinglake, Serjt. (with whom was *The Hon. R. Bourke*), for the respondent.—At the time the Reform Act passed, any person who had the requisite qualification, and had then attained the age of twenty-one years, was entitled to vote. If the construction now sought to be put upon the 27th section of that Act be the correct one, it would operate as a disqualifying section in many cases, and defer the acquisition of the franchise until the party had attained the age of twenty-

*68] two. This would be a manifest absurdity. It *never could have been intended that the party should not acquire a vote in respect of occupation unless he was of full age during the whole twelve months. [KEATING, J.—There is nothing in the 27th section of the Reform Act to disable an infant from being registered.] Nothing. The qualification spoken of in the 40th section of the 6 & 7 Vict. c. 18, means the estate or interest in respect of which the party is or claims to be registered.

Keane, Q. C., was heard in reply.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was right. The qualification given by the 2 W. 4, c. 45, s. 27, is given in these words,—"In every city or borough which shall return a member or members to serve in any future Parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being

either separately or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future Parliament for such city or borough." And that is followed by a proviso that "no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such year," &c. Under that section, the person claiming to vote must be of full age *when he appears to vote. Under the Registration Act, he must equally be of full age at the time he claims to be placed upon the register. The meaning of the 27th section appears to me to be this, that every male person of full age shall be entitled to vote, provided such person has occupied the qualifying property for twelve calendar months. "Such person" does not mean of full age at the time when the occupation began: he must be under no legal incapacity when he comes to claim the franchise. The 27th section of the Reform Act and the 40th section of the Registration Act are to be read together: and this latter section makes it clear that the question for the revising barrister is, whether at the time the party claims to be put upon the register he would be qualified to vote if that were the day of the election. The discussion before the revising barrister is substituted for the old contention at the polling-booth. That section enacts that the revising barrister "shall expunge the name of every person whose qualification as stated in any list shall be insufficient in law to entitle such person to vote;" and, further, in cases of objection, he "shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list." This latter part applies to the sufficiency of the qualifying property, not to the age of the party. The section then goes on,—"and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was *then* incapacitated by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the said lists." Imagine that an election is going on at the time of the revision, and the party comes and *claims to vote, and the barrister asks him "Are you of full age?" If the answer is in the negative, the name is to be expunged. If in the affirmative, the sufficiency of the occupation or other qualification (if objected to) is to be inquired into. It seems to me, therefore, that no person is to be put upon the register unless he be qualified to vote if an election were then going on. If the construction contended for by Mr. *Keane* were to prevail, viz., that the party must be of full age at the time the twelve months' occupation commences, it would have the effect of disqualifying very many persons from voting until they had attained the age of twenty-two; whereas, every man by the law of England acquires the full rights of citizenship on attaining twenty-one.

[*69

[*70

BYLES, J.—I am of the same opinion. The 8th section of the 7 &

8 W. 3, c. 25, enacted that "no person whatsoever, being under the age of one-and-twenty years, shall at any time hereafter be admitted to give his voice for election of any member or members to serve in this present or any future Parliament," and imposed serious penalties on infants who might be elected. We ought not, therefore, unless obliged, to extend the legal incapacity beyond the age of twenty-one at the time of voting. But we are obliged to do so to a certain extent, by holding that the party claiming the franchise must be twenty-one at the time of registration, because now (by 6 & 7 Vict. c. 18, s. 81) only two questions can be put at the time of voting, viz., as to the identity of the voter, and whether he has already voted. We are here asked to strain the words of the Reform Act, and to hold that the party must be of full age at the time of the commencement of the twelve months' occupation upon which his qualification rests. If the
*71] Legislature had intended that the *party should have been of full age during the whole of the twelve months preceding the last day of July, they would have employed appropriate language to express that intention. The proper construction appears to me to be, that the party must have occupied for twelve months, and must be of full age at the time he claims to be registered.. By adopting the construction contended for on the part of the appellant, we should in effect be extending the period of nonage to twenty-two.

KEATING, J.—I am of the same opinion. The only difficulty I have felt during the discussion has been as to how an infant could be kept off the register, if he had been for the requisite period the occupier of premises of the required value. But the remarks of my Lord upon the 40th section of the 6 & 7 Vict. c. 18 have removed that difficulty. I think the revising barrister was right in overruling the objection.

Kinglake, Serjt., asked for costs.

Keane, Q. C., opposed the application, suggesting that there had been contradictory decisions of revising barristers on the point.

ERLE, C. J.—Our general rule is, to grant the respondent costs where the decision of the revising barrister is affirmed; (*a*) still reserving to ourselves the exercise of a discretion under extraordinary circumstances.

The rest of the Court concurring,

Decision affirmed, with costs.

(*a*) And is in affirmance of the franchise? See Clarke, app., The Overseers of Bury St. Edmunds, resp., 1 C. B. N. S. 23, 33 (E. C. L. R. vol. 87).

*72] *Borough of KIDDERMINSTER.

RICHARD POWELL, Appellant; THOMAS GUEST, Jun., Respondent. *Nov.* 22.

A man has not "resided" in the borough "for six calendar months next previous to the last day of July," within the 27th section of the 2 W. 4, c. 45, when he has for a portion of that time been detained in a gaol situate more than seven miles distant therefrom, under a sentence of imprisonment for an assault, without the option of paying a fine.

1. AT a Court held for the revision of the lists of voters for the

borough of Kidderminster, Richard Powell duly objected to the name of Thomas Guest, Jun., being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of the occupation of a house in Stourbridge Street, in the parish of Kidderminster Borough, on the ground that the said Thomas Guest, Jun., had not resided for six calendar months next previous to the last day of July in the present year within the said borough or within seven miles thereof.

2. The qualification of the said Thomas Guest, Jun., was duly proved in all other respects.

3. On the 27th of February in the present year, the said Thomas Guest, Jun., was convicted of an assault, and committed by the magistrates of the borough of Kidderminster to Worcester jail for six months' imprisonment, without the option of paying a fine. He duly served the said term of imprisonment, and returned to Kidderminster on the 25th of August in the present year.

4. Worcester jail is situate more than seven miles from the borough of Kidderminster or any part thereof.

5. At the time of his conviction, the said Thomas Guest, Jun., resided at the above-mentioned house, and carried on there the businesses of a butcher and beerseller; and after his conviction, but before leaving Kidderminster, he made arrangements by which the said businesses were carried on and the said house was occupied by his servant on his behalf during his *absence, to whom he gave the key of the house, and paid him 15*s.* per week to conduct the said businesses. His furniture remained undisturbed in the house during his imprisonment; and immediately on the termination thereof he returned to his said house, and has continued to reside there ever since. [*73

6. The said Thomas Guest, Jr., is a widower, and has no family.

7. It was contended, on behalf of the said Richard Powell, that, under the circumstances stated, the said Thomas Guest, Jr., had not resided for six calendar months next previous to the last day of July in the present year within the said parish of Kidderminster Borough, or within seven statute miles thereof, or of any part thereof.

8. The revising barrister held, that, under the circumstances stated, the said Thomas Guest, Jr. had resided for six calendar months previous to the said last day of July in the present year within the said parish of Kidderminster Borough; and he therefore retained his name on the list of voters.

9. If the Court should be of opinion, that, under the circumstances stated, the said Thomas Guest, Jr., had not resided for six calendar months previous to the last day of July in the present year within the said parish of Kidderminster Borough, then the name of the said Thomas Guest, Jr., was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the Court should be of opinion that the said Thomas Guest, Jr., had resided during the time and in manner aforesaid within the said parish of Kidderminister Borough, the register of voters was to remain unaltered.

Keane, Q. C., for the appellant.—The 27th section of the Reform Act requires six months' residence in the *borough as one of the qualifications to entitle a party to be registered as a voter. [*74

Here, the greater portion of that period had been passed by the respondent in compulsory residence in a gaol distant more than seven miles from the borough. The residence required by the statute, is, an actual occupation by the party himself, or by his family or servants: Withorn, app., Thomas, resp., 7 M. & G. 1 (E. C. L. R. vol. 49), 8 Scott N. R. 783, 1 Lutw. Reg. Cas. 125. The residence must continue down to the time of voting: 6 & 7 Vict. c. 18, s. 79. In settlement cases, the effect of imprisonment was saved by the proviso in the 9 & 10 Vict. c. 66, s. 1, "that the time during which such person shall be a prisoner in a prison shall for all purposes be excluded in the computation of time:" The Queen *v.* The Inhabitants of Harrow-on-the-Hill, 17 Law J., M. C. 148; The Queen *v.* The Inhabitants of Salford, 12 Q. B. 106 (E. C. L. R. vol. 64), 17 Law J., M. C 170; The Queen *v.* The Overseers of Hartfield, 21 Law J., M. C. 65 (nom. Hartfield *v.* Rotherfield, 17 Q. B. 746) E. C. L. R. vol. 79); The Queen *v.* The Inhabitants of Potterhanworth, 28 Law J., M. C. 56. To have that effect, it required the express words of the statute. In The Queen *v.* The Inhabitants of Halifax, 12 Q. B. 111, 17 Law J., M. C. 158, it was held that a pauper is not irremovable from a parish on the ground of residence, under the statute 9 & 10 Vict. c. 66, s. 1, if, at any time during the five years (*a*) next before application for an order to remove him he has been removed from the parish under a prior order; for, such removal is a break in the residence: and it makes no difference that the pauper so removed leaves behind furniture in a house rented and occupied by him at the time of his removal, and retains the key of the house, and that he has always the animus revertendi, and actually returns and resumes *occupation of his house after an absence of a few days. [BYLES, J.—How does this case differ from that of a person illegally detained, or of a person imprisoned under a ca. sa.?] In the former case, there is in law no detention; and, in the latter, the party has the option of getting his discharge by paying the debt. Here, the respondent has by his own wilful misconduct deprived himself of the right to reside within the borough. In the case of In re Jones, 2 Ad. & E. 436 (E. C. L. R. vol. 29), an unsuccessful attempt was made to obtain a habeas corpus to enable a prisoner in custody upon a conviction for a misdemeanor to vote at an election.

*75]

Kinglake, Serjt. (with whom was *The Hon. R. Bourke*), for the respondent.—The revising barrister finds the fact of residence, unless the imprisonment precludes it. Decisions on settlement cases are altogether inapplicable to appeals under the Registration Act: per Maule, J., in Dewhurst, app., Fielden, resp., 7 M. & G. 182 (E. C. L. R. vol. 49), 8 Scott N. R. 1013, 1 Lutw. Reg. Cas. 274. The word "residence" has different meanings according to the occasion upon which and the intention with which it is used. The residence in Withorn, app., Thomas, resp., was clearly insufficient. In Rogers on Elections, 7th edit. 176, it is said: "The following cases were decided by the Ipswich committee. Pisey's Case, F. & F. 271. The voter at Midsummer (before the election) had removed a wagon load of goods to another house at some distance from Ipswich: the house at Ipswich was shut up till Michaelmas (the election being in July), to which

(*a*) Three years, by stat. 24 & 25 Vict. c. 55, s. 4. See the cases collected in Archbold's Poor Law, 11th edit. 701 et seq.

time he paid the rent and kept the key; he had never given notice to quit, but, on the contrary, had not abandoned all intention of returning. It did not appear whether all his furniture had been removed in the wagon, or whether any had been left. In Prentice's Case, F. & F. 273, it was *proved that the voter having removed in June from his house to one opposite, a placard of 'House to let' was [*76 put on the former house, which was returned 'empty' by the rate-collector, and the words 'Removed opposite' placed on the shutters: a few articles were left in the house till within a few days before Michaelmas, but he kept the key till Michaelmas, and held himself out as entitled to let the house. The election took place in July. The committee decided in Pisey's Case that the voter had not lost his qualification: in Prentice's Case they decided that he had. It is difficult to see any feature of legal distinction between the two cases: a distinction was, however, taken in argument, that there was an animus revertendi in one case, and not in the other: but surely that can make no difference. In cases of inhabitancy, where it is required to be inferred that a man, though personally absent, still continues to 'inhabit,' it is important to show that the absence is not permanent: but, unless personal residence by a man or his family be necessary to constitute occupation, it is immaterial, supposing actual occupation to be otherwise shown, whether his personal absence is permanent or only temporary." Could this man be said to be *residing* in Winchester gaol? In Nias *v.* Davis, 4 C. B. 444 (E. C. L. R. vol. 56), a prisoner in execution under a ca. sa. in the common gaol of the county of Radnor, but having a permanent lodging in London, where his wife and family resided, and to which it was his intention to return, was held to have a sufficient residence in London to petition the Court of Bankruptcy under the 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96. In Dunston *v.* Paterson, 5 C. B. N. S. 267 (E. C. L. R. vol. 94), it was held that a compulsory residence at the time of the commencement of the action in a gaol, did not constitute the place of detention the "dwelling" of the party, within the 128th section of the 9 & 10 *Vict. c. 95, s. 128. "We are of opinion," says Willes, J., in [*77 delivering the judgment of the Court, "that the gaol was not a dwelling within the meaning of the Act. The residence there was compulsory and temporary, without any intention on the plaintiff's part of remaining; but, on the contrary, with an intention shown by the facts, of leaving it when she could, and returning to her former place of residence, whenever she was discharged out of custody. The statute refers to the place in which the party dwells, as affecting the question of convenience to suitors in attending the County Court, and therefore must mean by the word 'dwelling' the *ordinary* dwelling of the party, and not a place like a gaol, where a person is temporarily detained, it may be for a single day or night, in custody." The King *v.* Mitchell, 10 East 511, is a very strong authority. There, freemen of Norwich, substitutes in the militia, quartered at Colchester, but having dwelling-houses in Norwich, in which their families resided, and to which they at times resorted on furlough (in some instances within the preceding six months only for the purpose of voting at elections), were held to be *inhabitants* within the charter of Norwich and a local Act (3 G. 2, c. 8) requiring them to have been inhabitants for six calendar

months previous to certain elections of corporate officers, in order to qualify them to vote. Lord Ellenborough there said: "The Act in question requires and ought to receive a reasonable construction, according to the subject-matter of it and the manifest object of the Legislature. The Act meant to secure the right of voting for corporate offices to the freemen bonâ fide inhabitants of the city for a certain period before the election, and is therefore satisfied by a bonâ fide inhabitancy. Now, of what other place but of Norwich could these men be said to be inhabitants at the time? They had *78] *their own dwelling-houses or homes there, in which they left their families dwelling, and to which they returned from time to time when they received leave of absence from their regiment. They had no other abiding-place than this; for, the place where the regiment happened to be quartered could not be considered as such: and, though they could not perform watch and ward at Norwich, yet they were liable there to all public burthens in respect of their houses there in which their families dwelt." The respondent in this case answers every one of the conditions mentioned in that judgment. [BYLES, J.—Suppose the qualification here had been one of the old reserved ones, to inhabitants paying scot and lot, would this person have been an inhabitant?] Clearly so, upon the authority of The King *v.* Mitchell. In The Queen *v.* The Overseers of Holbeck, 16 Q. B. 404 (E. C. L. R. vol. 71), it was held, that, under the 9 & 10 Vict. c. 66, s. 1, an imprisonment out of the parish, in default of paying a fine, upon a summary conviction, does not break the residence in the parish; and that, if there be on the whole a five years' residence, without reckoning the time of imprisonment, and the residence be continuous, with the exception of that time, the resident is irremovable. [BYLES, J.—Suppose the party had been confined in the county lunatic asylum, beyond the limits of the borough, or in a hospital, with a broken leg, would he lose his vote?] It is submitted that he would not. [BYLES, J.—In the cases I put, he is in no way accessory to his own confinement. Here, however, he is.] True: but, in the case of the militia men, there was a compulsory absence. Would a man lose his right to vote whose absence was occasioned by his seizure by a press-gang? Or a man imprisoned on suspicion of felony, and on his trial acquitted?

*79] *Keane*, Q. C., in reply.—In The King *v.* Mitchell, 10 *East 511, the parties were in the habit of coming back to Norwich from time to time on furlough, and were only absent on duty: and in The Queen *v.* The Overseers of Holbeck, 16 Q. B. 404 (E. C. L. R. vol. 71), the pauper had the option of relieving himself from the imprisonment by paying the fine. So, in the cases put, of the lunatic and the man with a broken leg, both might come back, the one when cured of his mental infirmity, the other on recovering his bodily health and strength. All that Dunston *v.* Paterson, 5 C. B. N. S. 267 (E. C. L. R. vol. 94), amounts to, is, that the word "dwelling" does not apply to a temporary detention in a gaol for debt: but, how can a man be said to "dwell" or "reside" in a place where he neither is nor can be? To entitle a person to the franchise in respect of the occupation of premises in a borough, he must have a lawful right to be present there during the statutory period. The decision in Nias

v. Davis, 4 C. B. 444 (E. C. L. R. vol. 56), turned upon the meaning of the word "reside" in the Bankrupt Acts.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was wrong, and that Guest, the respondent, had not a right to have his name retained upon the list of voters for the borough of Kidderminster. The 27th section of the Reform Act contains a proviso "that no such person," as before mentioned, "shall be so registered in any year, unless he shall have *resided* for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof or of any part thereof:" and this person was for a considerable portion of the six months in prison under sentence for a misdemeanor at a distance exceeding *seven statute miles from the borough. [*80
The Legislature has imposed residence as one of the conditions of qualification. Did this man reside in the borough during the specified time? I will assume that he had a house there, and a wife and family, and that he had animus revertendi: but, during the time he was in prison, he was not sui juris: he was not at liberty to return home: he had forfeited his right to do so by his own criminal act. I entirely subscribe to the doctrine so clearly laid down in Elliott on Registration, 2d edit. 204, where the learned author says, that, "in order to constitute residence, a party must possess at the least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite." "Absence," he continues, "no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence. But, if he has debarred himself of the liberty of returning to such dwelling, by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." The learned author says he loses his character of resident "if he has debarred himself of the liberty of returning to such dwelling," and he gives two examples, viz., letting the house, or abandoning the intention of returning. I think we may add to these a third case: I think this man has debarred himself of the liberty of returning, when he has been guilty of a criminal act, by reason of which the laws of his country have taken away from him the power of returning. Judges who have from time had to decide upon the meaning of "residence" in different statutes, have been obliged to resort to various shifting meanings of the word, according to the object and intention of the *Legislature in the particular [*81
statute in which it is used. In Nias *v.* Davis, 4 C. B. 444 (E. C. L. R. vol. 56), for the purpose of the administration of the Bankrupt Law, the party, though temporarily confined for debt in a distant county, was held to be resident in the place where his family was, and where probably also his creditors dwelt and his debts were contracted. I should say also that that statute was passed altogether alio intuitu from the statute now under consideration. Further, I should say that a man who is imprisoned for debt has not absolutely lost the liberty of returning to his place of residence: by paying the debt, he

becomes free to return. So, the case of the militiamen (The King *v.* Mitchell, 10 East 511) is in some degree consistent with the power to return to their residences. But a person who stands convicted and sentenced to an absolute term of imprisonment for a misdemeanor, without the option of purging his offence by payment of a fine, is under an utter disability to return to his home. I think all the cases cited are distinguishable, and that the intention of the Legislature will be carried out by holding that this respondent has not complied with the condition of residence which the statute imposes. If his imprisonment for five months were held not to deprive him of his right to be registered, I do not see why an imprisonment for two years should prevent him from being qualified. I think the decision was wrong, and must be reversed.

Byles, J.—I am of the same opinion. It is not necessary or convenient to lay down any universal rule on the subject: but I think the fair result of the authorities is, that legal inability caused by the criminal and voluntary act of the party, and not from misfortune, breaks the residence, and destroys the qualification. The case of a *82] man who is kept away from his *residence by bodily or mental infirmity, is distinguishable; as also is that of a militiaman absent for a time on duty, or of an innocent man accused and remanded, or committed for trial and acquitted. These are purely cases of misfortune. It is distinguishable also from that of a man imprisoned under a writ of ca. sa., or for non-payment of a fine: he may relieve himself from impediment to his return by paying the debt or the fine. Extreme cases may be suggested in support of either view. On the one side, it may be asked, would an imprisonment for twenty-four hours disqualify? On the other it might be asked, would twenty years' imprisonment disqualify? It is not easy at first sight to say where the line is to be drawn: but, upon the whole, I agree with my Lord that the decision of the revising barrister here was wrong.

Keating, J.—I am of the same opinion. Cases which approach the line are always very difficult to decide. But I am of opinion, that, where a man has by his own wrongful and criminal act deprived himself of the power of complying with the condition of residence in the statute in question, he cannot be said to have continuously resided in the borough. Decision reversed.

---

*83] *Borough of Kidderminster.

RICHARD POWELL, Appellant; WILLIAM JONES, Respondent.

Nov. 22.

A. was possessed of three houses (one of which he himself occupied), each being under the yearly value of 10*l.* Under a local Act, he compounded for the rates upon all the premises for one year. At the expiration of the year no new composition was entered into, but the overseers continued to assess the premises as before, though A. had improved those in his own occupation so as to increase their yearly value to upwards of 10*l.* He then claimed to be rated to the full rate in respect of the premises in his own occupation, but he did not at that time pay or tender the arrears of rates then due. No alteration was made in the rating. A. afterwards, and before the 20th of July, paid to the overseers a sum which was more than sufficient to satisfy all rates due in respect of the last-mentioned premises to the 5th of January, but made

no specific appropriation of the money at the time of the payment; and the overseers placed the amount against *all* the rates due:—

The revising barrister having found that A. was sufficiently rated, and that he had paid his rates so as to entitle him to be registered,—the Court refused to interfere with his decision.

1. AT a Court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of William Jones being retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the parish of Kidderminster Borough.

2. The said William Jones occupied in St. John Street, within the parish of Kidderminster Borough, for twelve calendar months previous to the last day of July in the present year, a house and garden of upwards of the clear yearly value of 10*l.*

3. The said William Jones was the owner of the said house and garden in his occupation, and also of the two adjoining houses.

4. The said William Jones some years since, under the provisions of an Act of 4 & 5 Vict. c. lxxii., intituled "An Act for better assessing and collecting the poor-rates in the borough of Kidderminster, in the county of Worcester," compounded with the overseers for the said borough for the poor-rates of the above houses for the term of one year; and by entering into such composition only one-half the amount was assessed on the said house and garden for poor-rates that would have been assessed thereon if the said *William Jones had not entered into such composition. At the expiration of the [*84 year for which such composition was entered into, and down to the month of July last inclusive, the July rate being made and allowed on the 22d of that month, the overseers continued to assess the said house and garden on composition, although the said William Jones did not enter into any composition agreement with them other than as above stated, neither did he attend any meeting of the overseers for the purpose of entering into any other composition agreement; but the demand made by the overseer, and the receipt given by the collector, stated that the rates were composition poor-rates.

4. Subsequently to the said William Jones entering into such composition as aforesaid, and previously to the 31st of July, 1863, he made improvements to the said house and garden, by which the clear yearly value thereof was raised to upwards of 10*l.*

5. The case contained an extract of the poor-rate made and allowed the 15th of October, 1863, so far as was material to this case (being the first rate made after the 31st July preceding), showing the names of the occupiers of two of the tenements (the third being void), and also the name of the owner (the respondent), the description of the property, the gross estimated rental, the rateable value, and the amount of the rate assessed upon the owner pursuant to the statute.

6. The said William Jones, in October, 1863 (but he could not state the precise day), claimed to be rated separately for the said two other houses, and to the full rate for and in respect of the house and garden in his own occupation, for the purpose, as he then stated to the overseer, of "getting his vote;" but he did not at the same time pay or tender the arrears of rates then due.

*85] *7. The overseer did not alter the rating in respect of the said house and garden in the occupation of the said William Jones.

8. The compound rate laid in October, 1863, amounted for all three houses and garden to 4*s.* 9*d.*, and there were arrears of former rates brought forward of 1*l.* 3*s.* 9*d.*, making the total rates then due in respect of the three houses, 1*l.* 8*s.* 6*d.*

9. The said William Jones, subsequently to his claiming to be separately rated as aforesaid, and previously to the 20th of July in the present year, paid to the overseers of the said borough the sums of 10*s.* and 12*s.* 6*d.*, making together 1*l.* 2*s.* 6*d.*, which was more than sufficient to pay all rates due previously to the 5th of January last in respect of the house and garden in his own occupation: but, at the time of making such payment, he did not state or specify to what rate or in respect of which houses he paid the said amounts: and the collector placed the amount against all the rates due, namely 1*l.* 8*s.* 6*d.*

10. It was objected, on behalf of the said Richard Powell, that the name of the said William Jones should be expunged from the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the said parish of Kidderminster Borough, inasmuch,—first, as he had not been rated in respect of such house and garden to all rates for the relief of the poor in such parish of Kidderminster Borough made during the time of such his occupation as aforesaid,—secondly, that the said William Jones had not paid the poor-rates payable from him previously to the 5th of January, on or before the 20th of July in the present year.

11. The revising barrister held that the said William Jones was *86] rated in respect of such house and *garden to all rates for the relief of the poor in such parish of Kidderminster Borough made during the time of his occupation, and that he had paid the poor-rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year; and accordingly retained his name on the list of voters.

12. If the Court should be of opinion, that, under the circumstances stated, the said William Jones was not rated in respect of such house and garden to all rates for the relief of the poor during the time aforesaid, or that he had not paid the poor-rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year, then the name of the said William Jones was to be expunged from the list of voters, and the register of voters was to be altered accordingly. But, if the Court should be of opinion, that, under the circumstances stated, the said William Jones was rated in respect of such house and garden, and had paid all rates payable from him previously to the 5th day of January, on or before the 20th day of July in the present year, the register of voters was to remain unaltered.

Keane, Q. C., for the appellant.—The revising barrister was wrong in holding, that, under the circumstances, Jones was rated in respect of the premises occupied by him, and had paid the rates due. By the 1st section of the local Act, 4 & 5 Vict. c. lxxii., it is provided that

the owners of dwelling-houses of a yearly rent of less than 10*l.* shall be rated instead of the occupiers. Compositions for rates are regulated by s. 2, which enacts, that, "if the owner of any dwelling-house within the said borough, the yearly rent or value whereof shall not amount to 10*l.*, shall be *desirous of paying a reduced rate for a year for the same, whether occupied or not, the overseers of [*87 the poor of the said borough, or any two of them, shall compound with such owner for the payment of the rates charged or chargeable thereon, in manner following, that is to say,—where the annual rent or value of the dwelling-house rated shall not amount to the sum of 7*l.*, at any sum not less than one-third of the amount of each rate, and at any sum not less than one-half of the amount of each rate where the annual rent or value of the dwelling-house shall amount to the sum of 7*l.* and shall not amount to the sum of 10*l.*: and all such compositions and reduced rates shall be entered in the rate-book of the said overseers, and shall be recoverable in like manner as poor-rates are now by law recoverable." And s. 3 enacts that "the overseers of the poor of the said borough shall yearly hold a meeting for the purpose of entering into any such composition with such owners as last aforesaid, and the said overseers shall give seven days' notice of the time and place of every such meeting, in the same manner as notices of vestry meetings are now required to be given; the first yearly meeting for such purpose to be held within ten days after the publication of the first rate to be made for the relief of the poor of the said borough after the passing of this Act." By the 2 W. 4, c. 45, s. 30, an occupier may demand to be rated: but a parishioner has no right to appeal (under the 17 G. 3, c. 38, s. 4) against a rate, on the ground that he is not rated therein: The King *v.* George, 6 Ad. & E. 305 (E. C. L. R. vol. 33), 1 N. & P. 451 (E. C. L. R. vol. 36). The respondent was the owner of the three houses and the occupier of one. It never was the intention of the statute that a person so situated should have the benefit of the reduced rate. No new composition was entered into after the first year; consequently, there was no authority for continuing the *reduced payment. Besides, the [*88 improvements made therein during the year, as found by the revising barrister, altogether took the premises in the respondent's own occupation out of the operation of the 4 & 5 Vict. c. lxxii., if they ever were applicable. To entitle a party to be registered in respect of a qualification as occupant, he must be legally rated. Non-payment of an illegal rate operates no disqualification: Fox, app., Davies, resp., 6 C. B. 11 (E. C. L. R. vol. 60), 2 Lutw. Reg. Cas. 97. This man was not legally rated. Then, assuming that he was well rated, had he paid all the rates due? This depends upon the doctrine of appropriation, as to which the rule is thus laid down in Roscoe on Evidence, 9th edit. 447 (10th edit. 470),—"In general, the party who pays money has a right to direct the application of it; but, where money is paid to a creditor generally without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may apply the money paid to whichever of those demands he pleases: Hall *v.* Wood, 14 East 243, n.; Clayton's Case, 1 Meriv. 572." [BYLES, J.—There may be appropriation by conduct, as well as by words.] No doubt. But there must be

something more specific than is found in this case. The proper time for appropriation is the time of payment.(a)

*89] *Kinglake*, Serjt., for the respondent, was not called upon.

Erle, C. J.—I am of opinion that the decision of the revising barrister ought not to be interfered with. It seems that Jones was rated. Any objection such as that alluded to by Mr. *Keane* might have been set right by appeal. Then, has he paid all the poor-rates which were payable from him in respect of the premises previously to the 6th day of April next preceding the day of revision? There is much weight in the argument as to the mode of appropriation. Actual express words are not essential to constitute an appropriation. Conduct and course of business will be enough. Although the statement of the case is somewhat meagre, I think enough appears to warrant the conclusion that Jones was rated, and that he paid enough to satisfy the rate payable from him in respect of the premises in his occupation, though he did not at the time make any specific appropriation of the money. As a question of fact, there is much in what has been urged by Mr. *Keane:* but it was all before the revising barrister. He has found that the money was so paid as to constitute a sufficient payment by the respondent: and I do not feel warranted in saying that there was no evidence to justify his decision.

Byles, J.—I am of the same opinion. The rate is primâ facie good. At all events, it was only reversible on appeal. As to the appropriation, I think we may assume that the receiver knew the intention of the payer when he made the payment.

Keating, J.—I am of the same opinion. Mr. *Keane* frankly admitted, that, if what passed when Jones claimed to be rated had passed

*90] at the time he paid the *rate, there would have been a complete appropriation of the payment to the discharge of his own rate. It does not appear from the case as stated by the revising barrister what time elapsed between the two transactions. I think the revising barrister's decision ought to be held conclusive.

Decision affirmed, with costs.

(a) "The intention of the *debtor*," says Mr. Roscoe, p. 448, "ought to be notified at [or before] the time of payment: per Abbott, C. J., and Bayley, J., in Mayfield v. Wadsley, 3 B. & C. 357, 362, 363 (E. C. L. R. vol. 10) 5 D. & R. 224. (E. C. D. R. vol. 16). But the *creditor* need not apply it to any particular demand at the moment of payment; he has a right to make the application at any subsequent period: nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand: Simpson v. Ingkam, 2 B. & C. 65 (E. C. L. R. vol. 9), 3 D. & R. 249 (E. C. L. R. vol. 16). See also Grigg v. Cocks, 4 Simons 438."

Lancashire.—Southern Division.

ARTHUR HEELIS, Appellant; THOMAS GOAD BLAIN, Respondent. *Nov.* 23.

1. Where a rent-charge is created by means of a conveyance to uses, the grantee immediately acquires "actual seisin," by the words of the statute 27 H. 8, c. 10, s. 1, and is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent.

2. *Aliter*, where the rent-charge is created by an ordinary grant at common law, as in Murray, app., Thorniley, resp., 2 C. B. 217, 1 Lutw. Reg. Cas. 496, and Hayden, app., The Overseers of Tiverton, resp., 4 C. B. 1, 1 Lutw. Reg. Cas. 510.

1. At a Court held for the revision of the lists of voters for the southern division of the county of Lancaster, Frederick Clayton objected to the name of Arthur Heelis being retained on the list of voters for the township of Pendleton, in respect of the qualification following:—

Christian and surname of each claimant at full length.	Place of abode.	Nature of qualification.	Street, lane, &c., where the property is situate. &c., or, if the qualification consist of a rent-charge, then the names of the owners of the property out of which such rent is issuing or some of them, and the situation of the property.
Heelis, Arthur.	Halton Bank, Eccles. Old Road, Pendleton.	An undivided sixth part or share of a perpetual chief or fee-farm rent of 50*l.* per annum.	Issuing out of land and a house and other buildings known as Hopefield Weaste Lane, in Pendleton, belonging to and occupied by W. T Blacklock.

*2. The said rent-charge of 50*l.* was created by indentures of lease and release dated respectively the 9th and 10th of June, [*91 1839, whereby certain land in Pendleton was granted, bargained, sold, and released by John Robinson and Stephen Heelis to John Spencer and his heirs, to the use, intent, and purpose that the said John Robinson and his assigns, during his life, and, after the determination of that estate by any means in his lifetime, then that the said Stephen Heelis and his heirs during the natural life of and in trust for the said John Robinson, and, subject to the aforesaid limitations, then that John Robinson, his heirs and assigns, should and might yearly and every year for ever thereafter have, receive, and take, from and out of the land thereby released, and the buildings to be erected thereon, one clear yearly rent or sum of 50*l.*, by half-yearly payments, on the 24th of June and 25th of December, and to further uses limiting to John Robinson, his heirs and assigns, or to Stephen Heelis and his heirs, as the case might be, powers of distress and of entry and perception of profits for securing the said yearly rent; and, subject to the said yearly rent of 50*l.* and powers and remedies for the recovery thereof,—to uses to bar dower: remainder to the use of John Spencer, his heirs and assigns, for ever.

3. All the estate and interest in the said land so vested in John Spencer became prior to the year 1862, and still is, vested in William Thomas Blacklock, and his heirs, in fee.

4. By an indenture made and dated the 3d of November, 1862, the said John Robinson granted and released the said rent-charge of 50*l.*, and all his estate therein, with the said powers and remedies for recovering the same, unto and to the use of the said Stephen Heelis, his heirs and assigns, for ever.

*5. By indenture duly executed and dated the 27th of January, 1864, and made between the said Stephen Heelis of the [*92 first part, John Heelis (a son of the said Stephen Heelis) of the second part, and the said Stephen Heelis and John Heelis, and Thomas Heelis, Arthur Heelis, James Heelis, and Edward Heelis, four other

sons of the said Stephen Heelis, of the third part,—the said Stephen Heelis, in consideration of the natural love and affection which he had and bore for his sons, the other parties to the deed, and for a nominal pecuniary consideration, granted and assured unto the said John Heelis and his heirs the said rent of 50*l.*, with the powers and remedies for the recovery thereof; and all his estate and interest therein; to hold unto the said John Heelis and his heirs, to the use of the said Stephen Heelis, John Heelis, Thomas Heelis, Arthur Heelis, James Heelis, and Edward Heelis, respectively, and their respective heirs and assigns, equally, in undivided sixth shares, as tenants in common, and not as joint-tenants.

6. The said rent-charge has always been duly paid to the parties entitled.

7. The half-year's rent which became due on the 24th of June, 1864, being the first which became due after the execution of the said indenture of the 27th of January, 1864, was on the 8th day of July following paid by the said William Thomas Blacklock to the said John Heelis, for and on behalf of himself and the five other parties entitled thereto under the last-mentioned deed; to whom he paid over their respective shares at various times between the 8th and 30th days of July. No portion of the said rent-charge was paid after the execution of the said indenture of the 27th of January, 1864, until the 24th of June, 1864, when the half-year's payment was made as aforesaid.

*93] 8. The land so conveyed in 1839, together with a *house and other buildings subsequently erected thereon, are the premises described in the fourth column of the said list of persons claiming to be entitled to vote.

9. The said Arthur Heelis named in the said indenture of the 27th of January, 1864, is the claimant Arthur Heelis named in the said list.

10. When the claim of Arthur Heelis came before the revising barrister, it was objected that he had not been in actual possession or in receipt of the rent for his own use for six calendar months next previous to the last day of July, 1864. On the other hand, the claimant contended that the said rent-charge having been originally created, *not by grant, but by a conveyance to uses*, he (the claimant) having on the 27th of January, 1864, become, by virtue of the indenture of that date, an assign of the said John Robinson, he was by the 4th and 5th

*94] sections of the Statute of Uses (*a*) *to be adjudged and deemed to be in possession and seisin of the share of the said rent-charge

(*a*) 27 H. 8, c. 10. The 4th and 5th sections are as follows:—

S. 4. "And where also divers persons stand and be seised of and in any lands, tenements, or hereditaments, in fee-simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them and to his or their heirs one annual rent of x*li.*, or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited, and made thereof,"—

S. 5. Be it therefore enacted, "that, in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements, or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent of and in such like estate as they had in the title, interest, or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or shall be seised to the use or intent of any such rent to be had, made, or paid, according to the very

in such like estate as he had in the use of the same; and that, so being in such possession and seisin, he was in the actual possession and receipt thereof for six calendar months next previous to the last day of July, 1864, within the meaning of the 2 W. 4, c. 45, s. 26.

11. The revising barrister considered that the seisin and possession mentioned in the said sections of the Statute of Uses, as explained and qualified by the subsequent words in the latter section, viz., "as if a grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent," and that the statutable seisin and possession was to the same extent and of the same effect only as if a grant of the said share of the said rent had on the said 27th of January, 1864, been made by William Thomas Blacklock to the claimant: and that, if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the meaning of the 2 W. 4, c. 45, s. 26. He therefore disallowed the claim of the said Arthur Heelis, and erased his name from the list of voters.

*12. If the Court should be of opinion, that, upon the facts [*95 stated, the claimant was by virtue of the said seisin to uses of the said William Thomas Blacklock, or otherwise, to be deemed in point of law to have been in the actual possession or receipt of the said share of the said rent for six calendar months next previous to the last day of July, 1864, then his name was to be restored to the list of voters. But, if the said Court should, upon the said facts, be of opinion that the claimant was not in point of law to be so deemed in the actual possession or receipt of the said share of the said rent, then his name was not to be restored to the said list.

13. The like claims were made by James Heelis, John Heelis, and Thomas Heelis, whose names appeared in the same list of claimants. The same objection was made to each of these claimants, and their names were erased from the list for the same reasons, and their cases consolidated with the principal case.

Joshua Williams, for the appellant.—The rent-charge in question was created by indentures of lease and release of the 9th and 10th of June, 1839, and was conveyed to the claimant and the other five persons named by indenture of the 27th of January, 1864. On the part of the claimant it was urged before the revising barrister, that, the rent-charge having been originally created not by grant, but by a conveyance to uses, he having become by virtue of the indenture of January, 1864, an assign of the grantee, he was *by the 4th and 5th sections* of the Statute of Uses to be adjudged and deemed to be in possession and seisin of the share of the said rent-charge in such like estate as he had in the use of the same, and that, so being in such possession and seisin, he was *in the actual possession and receipt thereof*

trust and intent thereof; and that all such and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make cognisances and justifications, and have all other suits, entries, and remedies for such rents as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent."

*96] for six calendar months next *previous to the last day of July, 1864, within the meaning of the 2 W. 4, c. 45, s. 26. The revising barrister considered that the seisin and possession mentioned in the sections of the Statute of Uses referred to, was explained and qualified by the subsequent words in s. 5, viz., "as if a grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent," and that the statutable seisin and possession was to the same extent and of the same effect only as if a grant of the said share of the said rent had on the 27th of January, 1864, been made by Blacklock, the assignor, to the claimant; and that, if such grant had then been made, nevertheless, until the actual receipt of part of his said share of the said rent, the claimant would not have been in the actual possession or receipt thereof within the 26th section of the Reform Act. The sections of the statute 27 H. 8, s. 10, upon which the decision proceeded, are, it is submitted, altogether irrelevant. They apply to the creation of the rent-charge, and not to its alienation, which is regulated by the 1st *97] section.(a) No rent *can be reserved out of a rent-charge. The words of the 26th section of the Reform Act are, that no

(a) That section recites, that "Where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made bonâ fide, without covin or fraud: yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts, and also by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance, at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids pur fair fits chivalier, and pur file marier, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest prejuries by trial of such secret wills and uses have been committed, the King's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords of their escheats thereof, and many other inconveniences have happened and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the antient common laws of this realm:" and "for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and antient laws of the same, and to the intent that the King's highness or any other his subjects of this realm shall not in any wise hereafter by any means or invention be deceived, damaged, or hurt by reason of such trusts, uses, or confidences," enacts, "that, where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any means whatsoever, it be, that, in every such case all and every such person and persons and bodies politic that have or hereafter shall have any such use, confidence, or trust, in fee-simple, or fee-tail, for term of life, or for years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and pur-

person shall be registered in any year in respect of his estate or interest in any lands or tenements as a freeholder, &c., unless he shall have been in the actual possession *thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar [*98 months at least next previous to the last day of July, &c. The words, "in *the receipt of the rents* and profits thereof," can have no application to the subject: the only words applicable are, "unless he shall have been in the actual possession thereof." Now, here, the claimant by virtue of the Statute of Uses, the 1st section of which gave him actual seisin *in fact*, and not a mere seisin *in law*, was in "actual possession" of his share of the rent-charge on the 27th of January, under the indenture of that date. The words of the Statute of Uses are sufficient to put the assignees of this rent-charge in the same situation as if they had been actual tenants of the estate in fee simple. That *this is so, is clear from all the authorities. In Bacon's Reading on the Statute of Uses, p. 48 (edit. 1806), it is said: "The third [*99 material words are, *lawful seisin, estate, and possession*, not a possession in law only, but a seisin in fact; not a title to enter into the land, but an actual estate. The fourth words are, 'of and in such estates as they had in the use;' that is to say, like estates, fee simple, fee tail, for life, for years, at will, in possession, and reversion; which are the substantial differences of estates, as was said before. But both these latter clauses are more fully perfected and expounded by the branch of the fiction of the statute which follows. This branch of the fiction hath three material words or clauses. The first material clause is, that the estate, right, title, and possession that was in such person, &c., shall be in cestui que use: for that the matter and substance of the estate of cestui que use is the estate of the feoffee, and more he cannot have. So as, if the use were limited to cestui que use and his heirs, and the estate out of which it was limited was but an estate for life, cestui que use can have no inheritance: so, if, when the statute came, the heir of the feoffee had not entered after the death of his ancestor, but had only a possession in law, cestui que use in that case should not bring an assize before entry, because the heir of the feoffee could not. So that the matter whereupon the use must work is the feoffee's estate."(a) In Comyns's Digest, *Uses* (I.), it is said that, "By the statute 27 H. 8, c. 10, cestui que use is immediately seised and in *actual possession*, and therefore shall have assize or trespass against a stranger before entry,"—citing Anonymous, Cro. Eliz. 46. In Cruise's Digest, Vol. 3, p. 274, s. 15, it is said: "With respect to the mode of acquiring seisin of a *rent, in the case of a *rent-service* the per- [*100 son entitled cannot acquire a seisin in deed before the rent becomes due; for, nothing but the actual receipt of it will have that effect. As to a *rent-charge*, the only mode of acquiring a seisin in

poses in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them."

(a) See Bacon's Works, by Basil Montagu, Vol. 13, p. 342; and the edit. by Spedding Ellis, and Heath, Vol. 7, p. 427.

deed of it, when created by grant, is, by the actual receipt of the whole or of some part of it; and, formerly, it was usual, where a freehold estate in a rent-charge was created, to pay the grantee a penny in the name of seisin of the rent. But, *where a rent is created by means of a conveyance to uses, the grantee immediately acquires a seisin by the words of the statute.*" That is what is contended for on the part of the appellant here. Lord Coke, commenting upon § 565 of Littleton, says,—Co. Litt. 315 a,—"Hereupon is to be observed a diversitie betweene money given by way of attornement, and where it is given as parcel of the rent by way of seisin of the rent. For, albeit the rent be not due before the day, yet a payment of parcel of the rent beforehand is an actuall seisin of the rent to have an assize. And so it is if he give an oxe, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent beforehand, this is good. And therefore a payment in name of seisin is more beneficial for the grantee, because that is both an actuall seisin and an attornement in law: and yet, being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but, as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actual seisin or a seisin in deed of a rent, whereof (as Littleton here speaketh) an assize doth lie; and a seisin in law which the grantee *101] hath by attornement before actual possession." To this *Mr. Butler adds a note,—"This is only to be understood of a rent at common law: but, if the rent is limited as an use under the statute, —as, if lands are conveyed by lease and release to A. and his heirs, to the use that B. may receive out of them an annual rent, the statute immediately executes the use of the rent in B." In Burton's Real Property, § 1115, it is said, that, "according to the rule that there cannot be a use upon a use, it is evident that, upon a conveyance of land to A., to the intent that B. may receive thereout a rent to the use of or in trust for C., only an equitable interest will be vested in C. But (§ 1116), if A., being the owner of the land, were to grant a rent out of it to B., to the use of C., here, by the first section of the statute, C. would take the legal estate. It may be objected, indeed, that B. is not, strictly speaking, *seised* of the rent, until he has received some part of it; for, by the old law, he could not bring an assize for it previously to such receipt; but there seems to be no doubt that the *seisin in law* which is conferred at once by the grant, is sufficient to put the statute in operation." Murray, app., Thorniley, resp., 2 C. B. 217 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 496, will be relied on for the respondent. The Court is there said to have decided that the words "actual possession," in the 2 W. 4, c. 45, s. 26, mean a possession *in fact*, as contradistinguished from a possession *in law;* and therefore that a grantee of a rent-charge is not entitled to be registered, unless he has been in the *actual* receipt of it for six months before the last day of July. That, however, is not an accurate statement of the ground upon which that case was decided. Tindal, C. J., in a judgment full of excellent law, lays it down, that "*the actual possession* of rent being a well-known legal phrase or expression, the Legislature

cannot be taken to have used it in any other than such well-known *sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer." [*102 Not a word was said there about the Statute of Uses: it was a grant at common law: and the case, as Maule, J., observes, in Hayden, app., The Overseers of Twerton, resp., 4 C. B. 1 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 510, "proceeded on the ground that the seisin requisite to entitle a party to be registered in respect of a rent-charge, is such as would have been necessary to enable the grantee to maintain an assize." This is a grant operating by the Statute of Uses. It is the seisin of John Heelis which serves the uses, and not the seisin of the person out of whose land the rent-charge issues: and therefore the claimants fulfil the requisitions of the Reform Act.

Keane, Q. C., for the respondent.—The Legislature did not by the 26th section of the Reform Act intend to draw the distinction suggested between a grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. There is no authority, strictly so called, for saying that the effect of the statute is to put the grantee or assignee of the rent-charge into actual possession thereof. The names of Bacon, Cruise, Butler, and Burton, however high-sounding, are not authority. [ERLE, C. J.—They are all great luminaries. Lord Eldon, in Smith *v.* Doe d. Jersey, 2 Brod. & B. 599, gives great weight to the opinions of conveyancers.(*a*)] The only semblance of authority is *the Anonymous Case in Cro. Eliz. 46, and that is extra viam. [KEATING, J.—Lord Chief Baron Comyns adopts it.] [*103 That shows that it is entitled to great respect, but does not make it an authority. "Possession" at that time meant something very different from "actual possession:" see Bevil's Case, 4 Co. Rep. 10 a. In Gilbert on Uses, 3d ed., by Sugden, p. 192, it is said, that, "Before the statute, a rent newly created might be bargained and sold; because, when the money, as an equivalent, was given, and ceremonies or words of law were wanting, the chancery supplied them; therefore this was good to pass the estate, without any words of granting. But, since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person to be executed in cestui que use: but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land; and consequently there can be no estate to be executed in the bargainee." To this the learned editor adds in a note, p. 193,—"The statute has two provisions for the execution of rents,—the first, for rents in esse limited to uses, which are executed in the same manner as uses of corporeal hereditaments,—the other, for rents limited in use out of the seisin of the land of some other person, *e. g.* where any

(*a*) "My Lords," he says, "between the year 1772 (it is a long while to look back to) and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer: and I was led at that time to a knowledge, not only of the practice there, but of what were the sentiments of the great conveyancers of those days; and I am as sure, I think, as I can be of my existence, that it never would have occurred to any one of them, if there was a leasing power in any marriage settlement, requiring such a power as this, that to give the time of fifteen or twenty days would be an invalid execution of the power. I am sure all practice was the other way; *and practice, my Lords, in this respect is evidence of what is reasonable.*"

person stands seised of any lands to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person
*104] seised to the use, and gives the cestui *que use a power of distress:" referring to Bascawin and Herle *v.* Cook, 1 Mod. 223, Cook *v.* Herle, 2 Mod. 138. All that the claimant here had, was, a title in law to a rent-charge: no actual possession, no pernancy of profits: and the statute only puts him in the same condition as if he had a common-law conveyance. The cases of Murray, app., Thornley, resp., 2 C. B. 217, 1 Lutw. Reg. Cas. 496, and Hayden, app., The Overseers of Twerton, resp., 4 C. B. 1 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 510, show, that, if this had been a rent-charge created by a common-law deed, the grantee would have had no right to be put upon the register unless he had been actually in receipt of the rent for six months previously to the last day of July. The judgment of Tindal, C. J., in the first of these cases is clear and decisive. "The question," he says, "undoubtedly turns upon the meaning of the words 'actual possession;' and we think these words mean a possession in fact, as contradistinguished from a possession in law; and that, as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case, where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed. There is a long course of authorities fully establishing the distinction between a possession or seisin in fact of a rent-charge, and a possession or seisin in law. Littleton, § 235, is an authority in point: 'And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a half-penny in name of seisin of the rent, then, if the next day of payment the rent be denied, the grantee may have an assise, or else not,' &c.: and Lord Coke, in his commentary on this passage,
*105] Co. *Litt. 160 a, is equally decisive: 'By this &c. is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise, or any other real action, but there must be an actual seisin.' And in Comyns's Digest, *Seisin* (C.) and (D.), the older authorities are brought together, establishing the distinction in this respect between a seisin in law and a seisin in fact, or, as it is called, an actual seisin. And this appears more distinctly in the commentary of Lord Coke on the 8th section of Littleton, which relates to the doctrine of possessio fratris, where Lord Coke says,— Co. Litt. 15 b,—'What, then, is the law of a rent, advowson, or such things that lie in grant? If a rent or an advowson do descend to the elder son, and he dieth before he hath seisin of the rent, or present to the church, the rent or advowson shall descend to the youngest son [that is, by the other venter], for that he must make himself heir to his father.' And, although Lord Coke there distinguishes the law as to the case of tenant by the curtesy, where, in favour of that estate, the husband shall have the rent although his wife dies before the rent-day, it makes no difference as to the present argu-

ment. The actual possession of rent being, therefore, a well-known legal phrase or expression, the Legislature cannot be taken to have used it in any other than such well-known sense, that is, *as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer.*" The mere interposition of an use is obviously an evasion of the statute. The decision of the revising barrister, therefore, in this case is plainly in conformity with the intention of the Legislature as expressed in s. 26 of the Reform Act.

Joshua Williams, in reply.—Actual legal decisions *are not [*106 to be expected upon every point which arises: but the works referred to have always been esteemed works of authority on the subjects of which they treat. [ERLE, C. J.—The dicta of learned men certainly have much weight with me: but, where it is to be had, the point for adjudication has more. I do not think we need trouble you further.]

ERLE, C. J.—I am of opinion that the revising barrister is wrong, and that the claimant is entitled to be registered. He claimed to have been in the actual possession of a share of a rent-charge for six calendar months before the 31st of July; and it appears that more than six months before that day a rent-charge of 50*l.* which had been created by the owners in fee simple of certain land in Pendleton in 1839, was conveyed by Stephen Heelis, to whom it had come by various mesne assignments, to John Heelis and his heirs, to the use of the claimant and five other persons as tenants in common. No payment on account of the rent-charge was due or paid to the claimant and the other five persons until after the 24th of June, 1864: and, if it had been the case of a conveyance at common law, without the aid of the Statute of Uses, it is clear from Hayden, app., The Overseers of Twerton, resp., 4 C. B. 1 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 510, that there would have been no actual receipt of the rent-charge so as to entitle the claimant to be registered. But the conveyance under which the party claims here is a conveyance operating by the Statute of Uses; and the 1st section of that statute enacts, that, where any person shall be seised of (amongst other things) any rent, &c., in trust for any other person, &c., the cestui que trust shall have lawful seisin and possession of the same. The statute 2 W. 4, c. 45, s. 26, enacts that no person shall be registered in any year in respect of his estate or *interest in any lands or tenements, &c., [*107 unless he shall have been in the actual possession thereof, or in the receipt of the rents and profits thereof, for his own use, for six calendar months, &c. The 27 H. 8, c. 10, s. 1, says, that, where any person is seised of a rent to the use of any other person, the person who has the use shall stand seised in possession of such rent to all intents and purposes in the law. I am of opinion that the word "possession" has a technical meaning, and that the Legislature in the time of Henry 8 and the Legislature in the time of William 4 attached the same meaning to the words "actual possession," and that a conveyance under the 27 H. 8, c. 10, gives the cestui que use the actual possession which is required to constitute a qualification under the 2 W. 4, c. 45, s. 26. It is said that the merely interposing an use is an evasion of the statute. But I attach no weight to that argument, because the two cases which have held that actual receipt of the rent

is essential to perfect the right to be registered, show that the handing over anything in the name of the rent would afford less facility of proof than the production of a deed operating by virtue of the Statute of Uses, which has been put in practice thousands of times since the time of Henry 8. So far, therefore, as regards the statute. Then, as to the authorities, Mr. *Williams* has invited our attention to some which are entitled to the very highest respect. In Anonymous, Cro. Eliz. 46, is a resolution of divers justices that cestui que use at this day is immediately and actually seised and in possession of the land, so as he may have an assise or trespass before entry against a stranger who enters without title; and this by the words of the 27 H. 8, c. 10, viz., "that cestui que use shall stand and be seised," &c. And, though the report is short, it is not the less valuable, for, often in the reports
*108] of that day the most important propositions *are laid down in four or five lines, and certainly lose no force by reason of their conciseness. Then, again, we have Bacon's Readings upon the Statute of Uses, which is also entitled to very great respect. So, Chief Baron Comyns, whose great work stands high in the estimation of every one in the profession, and who is the universal referee for almost every proposition, lays it down,—title *Uses* (I.),—that, "by the statute 27 H. 8, c. 10, cestui que use is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry;" adopting the dictum in Cro. Eliz. 46. Then we have the authority of Co. Litt. 315 a, and Butler's note, which seems to me to involve the whole of the learning contained in the judgment of Tindal, C. J., in Murray, app., Thorniley, resp., 2 C. B. 217, 1 Lutw. Reg. Cas. 496. Butler's note points out the distinction between the conveyance of a rent at common law and the limitation of a rent as an use under the statute. Then, I take notice of that which is not strictly authority, viz., Cruise's Digest. vol. 3, p. 274, s. 15, and Burton's Compendium of the Law of Real Property, § 1116; and I think I am warranted in so doing, since it is a main ground of Lord Eldon's judgment in the Britton Ferry Case (*a*) that the practice of conveyancers is to be taken notice of by those who administer the law,—a very wise and salutary principle; for, according to my experience, the persons intrusted with that branch of the law have ever been remarkable for ability and learning: and the argument which we have heard this day satisfies me that the mantle of those great men has not descended upon unworthy shoulders.

*109] KEATING, J.(*b*)—I also am of opinion that the *decision of the revising barrister in this case was wrong; but I feel bound to add, that, if I had been called upon to decide the point, unaided by the light of the able argument we have heard this day, I should have come to the same conclusion. Mr. *Williams* has satisfied me that there is a clear distinction between the grant of a rent-charge at common law and a grant operating by virtue of the Statute of Uses. The 26th section of the Reform Act enacts that no person shall be registered in any year in respect of his estate or interest in any lands or tenements, as a freeholder, &c., unless he shall have been in the *actual possession* thereof, or in the receipts of the rents and profits

(*a*) Smith v. Doe d. Lord Jersey, 2 Brod. & B. 599 (E. C. L. R. vol. 6).

(*b*) Byles, J., was engaged at the Central Criminal Court.

thereof for his own use, for six calendar months at least next previous to the last day of July in such year. In Murray, app., Thorniley, resp., 2 C. B. 217 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 496, it was held that a grant of a rent-charge at common law did not give the grantee a right to be registered under that provision unless he had been in actual receipt of the rent for the prescribed period. The Chief Justice founds his judgment in that case upon the very authorities which have been brought before us to-day. He cites the 235th section of Littleton,—"And so it is, if a man grant by his deed a yearly rent issuing out of his land to another, &c., if the grantor thereafter pay to the grantee a penny or a halfpenny in name of seisin of the rent, then, if after the next day of payment the rent be denied, the grantee may have an assise, or else not, &c." Lord Coke, exemplifying his own doctrine that there is often virtue in an etcetera, explains what that means, thus,—"By this &c. is implied that the grant and delivery of the deed is no seisin of the rent; and that a seisin in law, which the grantee hath by the grant, is not sufficient to maintain an assise or any other real action, but there must be an actual seisin." Mr. *Williams* admits that the *actual possession spoken of in the Reform Act must be such an actual possession as would have entitled the party to maintain an assise. Then we find from the Anonymous Case in Cro. Eliz. 46,—which certainly derives additional authority from being cited by Chief Baron Comyns,—that, "by the statute 27 H. 8, c. 10, cestui que use is immediately seised and in actual possession, and therefore shall have assise or trespass against a stranger before entry." That therefore brings this case precisely within the ground upon which Murray, app., Thorniley, resp., was decided, and establishes the distinction between the grant of a rent-charge at common law, and a grant under the Statute of Uses. Upon these grounds I am of opinion that the revising barrister took an erroneous view of this case, and consequently that his decision must be reversed. [*110

Williams asked for costs.

ERLE, C. J.—Where the decision is in favour of the appellant, no costs are allowed. But, where the decision is in favour of the respondent, the *general* rule is to give him his costs,—the Court reserving to itself the right to modify the rule as the circumstances of each case may seem to them to render it expedient. Decision reversed.

*111] *City of London.

MAURICE BENISH, Appellant; THOMAS WOODZELL BOOTH, Respondent.(a) *Nov.* 23.

The duplicate notice of objection, stamped by the postmaster pursuant to the 100th section of the 6 & 7 Vict. c. 18, produced before the revising barrister, had written at the top of it the word "Copy :"—Held, that (assuming that the word "Copy" was not on the notice transmitted by the postmaster to the person objected to) the notice was well served.

1. At a Court held to revise the lists of parliamentary voters for the city of London, Thomas Woodzell Booth, on the list of voters of the livery of the company of distillers, objected to the name of Maurice Benish being retained on the list of voters for the parish of St. Botolph-without-Aldersgate.

2. Upon calling upon the objector to prove that he had given the notices of objection respectively required by the Registration Act (6 & 7 Vict. c. 18), he duly proved the requisite notice given to the overseers, as to which therefore no question arises in the present case; and the party who had posted the notice directed by the Act to be served on the party objected to produced before the revising barrister the notice, duly stamped with the stamp of the London post-office, of which an exact transcript follows,—

"To Mr. Maurice Benish.

*112] "I hereby give you notice that I object to your *name being retained on the list of persons entitled to vote in the election of members for the city of London. Dated, &c.

"Thomas Woodzell Booth,
"12, Manor Place, Walworth, S.

"On the list of voters of the livery of the company of distillers."

3. It was admitted that the word "copy" on the notice produced before the revising barrister was on the said notice before it was taken to and stamped at the post-office, and that the words "Thomas Woodzell Booth," subscribed thereto, were in the proper handwriting of the objector. An objection was thereupon duly made before the revising barrister to the reception of any parol evidence to explain the state of the notice retained by the postmaster to be forwarded to the address thereon: but he admitted the party posting the notice to supply such explanation: and he did prove on oath to his, the revising barrister's, satisfaction that the word "copy" was not on the notice retained by the post-office to be forwarded to its address.

4. Thereupon the revising barrister held it to be duly proved that the objector had given the notices of objection required by the Registration Act, and called upon the party objected to to prove that he was entitled to have his name inserted in the list of voters in

(a) When this case was called on upon a former day, it appeared that the appellant had delivered his paper-books, but the respondent had delivered none. As, however, the appellant had not, pursuant to the 7th rule of Hilary Term, 4 W. 4, supplied the respondent's omission on the day following that upon which the latter should have delivered his paper-books, he was not in a condition to ask for judgment. The court thereupon directed (the respondent being then prepared with his copies) that the case should stand in the paper for the next day, being desirous not to prejudice a voter's right, by striking out the appeal.

See Dorsett v. Aspdin, 11 C. B. 651 (E. C. L. R. vol. 73). But see Sheddon, app., Butt, resp., 11 C. B. 27.

respect of the qualification described in the list; and, on his failure to do so, he expunged his name from the said list.

5. It was contended by the appellant,—first, that parol testimony was inadmissible to prove the contents of the notice retained to be forwarded by the postmaster, the same being a judicial instrument required by statute to be in writing, and which in this case by the express words of the 100th section of the Registration Act must explain and prove and be complete in itself,—secondly, that, while the Registration *Act allows a certain latitude in the forms of notices for counties and for claims, and also of notices of objection to overseers in cities and boroughs, provided the words employed be "to the like effect" as the statutory form, it admits of no such deviation in the case of borough notices to be served on parties objected to, and therefore the notice now in question was not "according to the form numbered 11 in the schedule B.," in which the word "copy" does not appear,—thirdly, that a statutory judicial written instrument must be held in law to be what on the face of it it purports to be; and that, inasmuch as the notice produced before the revising barrister purported to be a "copy," it could not be adduced by the author as the original notice required by the Act; that the word "copy" was not surplusage, because it is a term which assigns a distinctive and specific negative character to the document to which it is affixed, amounting in fact to a protest on the part of its utterer, that, as against him, such document is not to be allowed to have the effect and authority of an original,—not to have the effect, in short, in the present instance, of proving that the objector gave the notice required by the Act, without evidence of which the party objected to would not be in foro or entitled to the costs of a groundless objection, that the notice was not the less a "copy" because the words "Thomas Woodzell Booth" were in the actual handwriting of the objector, inasmuch as it was as competent for himself as for any amanuensis to make copies of his own notices; and the case was likened to that of a transcript of a foreign bill of exchange (which requires no stamp) if it bears the word "copy" on it before it is issued, and which would not become an original in the hands of an endorsee merely because the transcription was made in the handwriting of the acceptor,—fourthly, that, if the notice left with *the post-office to be forwarded to its address did not bear the word "copy," it was not a duplicate of the notice produced before the revising barrister, and could not therefore be the notice required by the Act,—fifthly, that the necessity imposed on the objector by the nature of his own argument, of contending that the notice produced by him as a duplicate was not in fact a duplicate was an inadmissible approbation and reprobation of the same instrument by the same party,—sixthly, that, as the notice was produced before the revising barrister as a duplicate original, it must be assumed that the duplicate forwarded to its address purported to be a "copy," and that, as such, the person objected to was entitled to disregard it, as not being an original, and to reckon upon the stamped duplicate being rejected by the revising barrister,—seventhly, that the objector's own case being that the notices were not "alike in their address and their contents," the authenticity of the service by the post-office

[*113

[*114

was thereby destroyed, and that the production of the stamped notice ceased to be the proof of service desiderated by the statute,—eighthly, that, if the post-office had dispensed with identity in one respect, as not being essential, there was no security against its having dispensed with it in others as equally non-essential; and that, if it had certified that the word "copy" was on the notice forwarded to its address, when it was not, it might have certified the date, the address, the signature, as in duplicate, when in point of fact in the document served they might have been omitted,—ninthly, that there could be no safe reliance on service by the post-office, except on the assumption that the postmaster had rigidly followed the injunctions upon him prescribed by the Act; that he was no reliable judge of what is or is not material and essential in a judicial instrument; and that, if
*115] any *discretion were left to him to determine what particulars therein are essential and what are immaterial or surplusage, his stamp might authenticate as duplicates the most material deviations from the requisites of essential identity.

6. On the part of the respondent it was contended,—first, that the word "copy" was not part of the "contents" of the notice, and might be treated as surplusage,—secondly, that the notice was constituted an original duplicate by having been signed by the objector proprio manu,—thirdly, that it was proved that the duplicates were essentially alike,—fourthly, that the duplicate forwarded to the party objected to not having the word "copy," he could not be misled into treating it as not being an original instrument, and he was placed at no disadvantage by the deviation excepted to,—fifthly, that, being "alike" is not "commonly understood" as being *identical*,—sixthly, that no practical inconvenience could result from the construction put upon the statute by the revising barrister.

7. The names of several other persons having been expunged from several lists of voters on objection by the said Thomas Woodzell Booth, whose cases depended and were decided upon the same points of law, and such parties having given notice of appeal, their cases were consolidated with the principal case.

8. If the Court should be of opinion that due notice of objection was not given to the parties objected to, their names were to be re-inserted in the lists from which they had been expunged.

9. The stamped notice of objection produced before the revising barrister in the case of the appellant Maurice Benesh (which was in all things but the stamp identical with that above set out) was
*116] appended *to and was to be taken as part of the case. The notices in all the other cases were precisely similar.

Hannen (with whom was *Underdown*), for the appellant.—The 17th section of the 6 & 7 Vict. c. 18 requires notice of objection to be given to or left at the place of abode of the person objected to. The ordinary way of proving that would be by calling the person who delivered the notice. No such proof was given here. The 100th section substitutes a delivery by post. It enacts that "it shall be sufficient, in every case of notice to any person objected to in any list of county, city, or borough voters, &c., if the notice so required to be given as aforesaid shall be sent by the post, free of postage, or the sum chargeable as postage for the same being first paid, directed to

the person to whom the same shall be sent, at his place of abode as described in the said list of voters; and, whenever any person shall be desirous of sending any such notice of objection by the post, he shall deliver the same, duly directed, open and in duplicate, to the postmaster, &c.; and the postmaster shall compare the said notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place." The statute, if the statutory mode of service is resorted to, must be strictly complied with. The postmaster has authority to do no more than compare the two documents word by word, *and to select one to forward and return the other. If the document [*117 forwarded to the party to whom it is addressed has the word "copy" on it, the party may well disregard it, inasmuch as the statute says that he shall be served with an original. And, if extrinsic evidence is to be admitted to show that the word "copy" was not upon the other paper, then it will appear that they were not duplicates. In Toms, app., Cuming, resp., 7 M. & G. 88 (E. C. L. R. vol. 49), 8 Scott N. R. 910, 1 Lutw. Reg. Cas. 200, it was held that the notice of objection, and also the duplicate notice, where notice of objection is sent by post, must both be *personally* signed by the objector. There, the notice had been signed by the objector, and the copy by another person at his request. "The very meaning of the term *duplicate*," said Tindal, C. J., "is, that one document resembles the other in all essentials. The instance put by my Brother Maule in the course of the argument, of bills drawn in duplicate, is an apt illustration. In this case, one of the documents was a notice; but the other was no notice at all." Maule, J., says: "The term 'duplicate' means a document which is essentially the same as some other instrument. It is a very different thing from an examined copy; although an examined copy may, in effect, be a duplicate under certain circumstances. But, in the present case, the copy is essentially different from the original." And Cresswell, J., says: "As to the duplicate, the objector is relieved from the proof of the ordinary service of the notice by adopting the course prescribed by the 100th section: but he must show that the document sent by the post is identical with the one produced before the barrister. The objection, no doubt, is a very fine one: but the same may also be said of cases arising upon the Statute of Frauds, which frequently excludes evidence of facts which are well known to exist. The objection was *quite as fine in Birch, app., Edwards, resp., 5 C. B. 45 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 37. It was [*118 there held that a notice of objection sent by post was not proved by the production of a stamped copy similar in all respects to the notice left with the postmaster, save that it had *no external address*,—such copy not being a "stamped *duplicate*," within the meaning of the Act. [KEATING, J.—The two were not alike "in their address and in their contents."] Yes they were: but the address was inside the one, and

outside the other. Wilde, C. J., there says: "One important point to be ascertained in such a case, is, what was the direction given to the postmaster with respect to the transmission of the notice. The matter that appears upon the face of the paper is not intended for any such object. When I find the Legislature providing that the two papers shall be alike in their *address* and in their *contents*, I cannot conceive, that, because it is possible so to fold the paper as to make the direction upon the face of it answer the purpose of an external address, the objection is obviated. I see much inconvenience that might result from a departure from so plain and simple a direction; but none can arise from a strict and literal adherence to the words of the Act." Coltman, J., says: "When the statute speaks of a document to be transmitted by the post 'duly directed' to the person to whom it is to be sent, it can only contemplate a direction in the ordinary way, written on the outside. And it appears that the copy retained by the postmaster had such external address. The absence of such external address on the copy returned by the postmaster to the person producing it, was a variance, and not an immaterial one." And Maule, J., says: "The notice left with the postmaster was a notice having, in addition to the address on the face of it, a direction outside, to inform the postmaster where and to whom it was to
*119] *be transmitted. This external address is a most essential part of the notice. It was material to show what the postmaster was required to do. The paper produced as evidence of the notice omits to state what direction was given at the post-office. It therefore seems to me to be defective in an essential particular." The two documents must be brought in such a state that either will pass for an original: otherwise it makes the postmaster the judge of whether or not they are duplicates. It will be unsafe to depart in any the slightest degree from the plain words of the statute.

Fawcitt, for the respondent, was not called upon.

ERLE, C. J.—This is so fine an objection that I do not feel justified in yielding to it. The statute (s. 17) requires notice of objection to be served upon the person objected to; and it also (in s. 100) contains a provision for the transmission of the notice by post, where the objector chooses to avail himself of that mode of service. He is to deliver the notice, open and in duplicate, to the postmaster; and the postmaster is to compare the notice and the duplicate, and, on being satisfied that they are alike in their address and in their contents, shall forward one of them to its address by the post, and shall return the other to the party bringing the same, duly stamped with the stamp of the said post-office; and the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate, on the day on which such notice would in the ordinary course of post have been delivered at such place. One duplicate original is to be sent to the person objected to, and the other duplicate original is to be returned *to and kept by the objector. If one
*120] were headed "Duplicate," and the other not, and the two were in all other respects alike in their address and in their contents, I am of opinion that that would be a sufficient compliance with the statute. In common parlance the one would be called a copy of the other.

All notices are in law originals: but it is by no means uncommon for the person who has served a notice, in the affidavit of service to state that he served "a copy." I therefore think that the placing the word "copy" at the top of the duplicate notice in this case does not in the smallest degree affect the validity of the document.

BYLES, J., was engaged at the Central Criminal Court.

KEATING, J.—I also am of opinion that the validity of this notice is not at all affected by the word "copy" being written on the document produced before the revising barrister. In the case relied on by Mr. *Hannen*, of Birch, app., Edwards, resp., 5 C. B. 45 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 37, the variance between the two documents was a very material one. The external address was an essentiat part of the notice: one had it, the other had not: and the Court hold that the direction to the postmaster with respect to the transmission of the notice was contained in the external address. The word superadded here is one which is altogether immaterial. That case, therefore, cannot govern this. The decision must be affirmed.

Decision affirmed, with costs.

---

*County of SURREY.—Eastern Division. [*121

JABEZ TEPPER, Appellant; DAVID NICHOLS, Respondent.

Nov. 24.

By a local Act, 12 G. 1, c. 36 (1724), and a subsequent Act of 1 G. 2, c. 18 (1728), commissioners or trustees were incorporated and empowered to treat with the proprietors of an ancient ferry between Fulham and Putney for the purchase of their rights, and to procure persons to subscribe capital for the building of a bridge between those two places, and to convey to those persons in perpetuity *the surplus tolls or income of the bridge and ferry after providing for the expenses of repairs, &c.* The commissioners having agreed with thirty individuals who each subscribed 1000*l.* for the building of the bridge, and having compensated the proprietors of the ferry, in 1729, by a deed, reciting several of the provisions of the two Acts above mentioned, and that the thirty individuals had paid the sums subscribed by them, and built the bridge, assigned to trustees, in trust for those persons, their heirs and assigns for ever, the said bridge and all the materials whereof the same was erected and built, and all tolls, revenues, profits, and incomes of the said bridge, *with all such ground and soil adjacent and belonging to the ferries as had been, was, or should be vested in the said commissioners*, &c.:—

Held, that the commissioners had no authority under their Acts of Parliament to convey to or in trust for the subscribers or shareholders in the bridge any lands vested in them by those Acts; that the latter, having notice of the powers which the commissioners had, took under the deed of 1729 nothing more than the commissioners could lawfully convey; and that consequently they had not such an interest in the land on either side of the bridge as to entitle them to be registered for the county.

1. AT a Court holden at Wandsworth, in the county of Surrey, to revise the list of voters for the eastern division of the county of Surrey, David Nichols, a person on the register of voters for the said eastern division, duly objected to the names of Jabez Tepper and twenty-four other persons being retained on the Putney list of voters for the said eastern division.

2. The claims of the persons so objected to appeared upon the register and upon the new claim list in respect of freehold shares or parts of shares in Fulham (or Putney) Bridge:—

3. In support of the right of the several parties to have their names

retained and placed on the said lists, the following documents and facts were duly established in evidence before the revising barrister:—

4. In or about the year 1724, the Act 12 G. 1, c. 36, was passed, intituled "An Act for building a bridge across the river Thames, from the town of Fulham, in the county of Middlesex, to the town of Putney, in the county of Surrey."

5. By s. 1 of that Act certain persons were constituted and appointed commissioners and trustees for *designing, directing, ordering, and building such bridge, and for maintaining, preserving, and supporting the same when built: and they were empowered, at any time after the 24th of June, 1726, to design, assign, and lay out how and in what manner the said bridge should be made and built from the town of Fulham to the town of Putney aforesaid, *and the ways and passages to and from the same*, and to preserve and keep in repair such ways and passages from time to time, and to make contracts, and do all matters and things for carrying on and effecting the purposes aforesaid, and to cause the same to be done and perfected accordingly.

*122]

6. And to the intent that the navigation of the said river Thames might receive no prejudice, by s. 2 it was enacted, "that, when the said bridge was built across the river, there should remain free and open passage for the water to pass and repass through the arches or passages under the said bridge of 700 feet at the least within the then present banks of the said river." By s. 5, bodies corporate and others who were seised of ground in Putney or Fulham which might be required for the purpose of making convenient approaches to the said bridge, were enabled to convey to the said commissioners and trustees, or to any nine or more of them, or their successors, or as they should appoint, any such ground for the purposes of that Act.

7. By s. 7, it was enacted "that it shall be lawful to and for His Majesty, his heirs and successors, by letters patent under the great seal of Great Britain, to incorporate all and every the commissioners and trustees appointed by this Act, or who shall be appointed pursuant thereto to be commissioners and trustees for putting this Act in execution, or such of them as shall be then living, and such others as His Majesty, his *heirs or successors, shall think fit, to be one body politic and corporate in deed and in name, &c.; and that they and their successors shall be able and capable in law to have, purchase, receive, and enjoy, possess, and retain to them and their successors, messuages, lands, rents, tenements, and hereditaments, of what kind, nature, or quality soever, and also to sell, grant, demise, alien, or dispose of the same or any part thereof at their free wills and pleasures, to sue and implead, be sued and impleaded, &c., and to choose their successors and officers from time to time, and to do and execute all and singular other matters and things that to them shall or may appertain to do, with such powers and clauses as shall be necessary or requisite for erecting, building, preserving, and supporting the said bridge, and the ways and passages thereto from time to time." The said commissioners and trustees were never incorporated in pursuance of this Act.

*123]

8. By s. 8 it was enacted that it should not be lawful to or for the corporation or company which should or might be erected or established by virtue of or pursuant to that Act, as such corporation or

company, to borrow or take up or give security for any sum or sums of money payable in less than six months, or to discount any bills of exchange or other bills or notes whatsoever, or to keep any books or cash of or for any person or persons, bodies politic or corporate, whatsoever, other than and except only the proper books, moneys, and cash of the said company or corporation.

9. By s. 10 it was enacted that a certain pontage or toll should be paid before any passage over the said bridge should be permitted, and that the said pontage or toll should be vested in the said commissioners, to be by them applied, in accordance with the provisions of the said Act, towards the expenses of making and *maintaining the said bridge, ways, and passages, and purchasing [*124 the necessary ground for the same.

10. By s. 13, the commissioners or any eleven or more of them were empowered when incorporated by indenture or writing under their common seal to convey and assure the toll by that Act granted, or any part thereof, as a security for any sum or sums of money by them to be borrowed for the purposes of the Act, and to grant any annuities for one, two, or three lives or for twenty-one years, or a less term; such annuities to be chargeable upon and payable out of the tolls, estates, and revenues belonging to such corporation. By s. 14, it was enacted that such annuities should be personal estate. By s. 16, it was enacted that it should be lawful for the said commissioners and their successors, and for such intended company or corporation, and their agents, or officers, from time to time to remove any shelfs in the said river Thames, and to make the same river deeper.

12. By s. 17, it was enacted that all stones, bricks, planks, piles, and other materials which should be made use of for or towards building or making the said bridge, or in or about the same, or for maintaining, repairing, or supporting the same, or for making the said river deeper as aforesaid, should always be deemed to belong and appertain to the commissioners and corporation aforesaid. And by the 18th section it was provided, that if the said bridge should at any time become damaged, it should be lawful for the said commissioners or corporation to set up ferries across the said river near to the said bridge, and to take certain rates and duties for passage by such ferries over the same.

13. By s. 19, it was enacted as follows:—"It shall not be lawful to erect or build the said bridge or any part thereof before or until full and ample satisfaction *be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by [*125 any of the owners, proprietors, lessees, or others having any property or interest in the present horse or foot ferries between Putney and Fulham aforesaid."

14. By s. 22 it is enacted, "that nothing in this Act contained shall extend or be construed to extend to prejudice or take away any right, property, or jurisdiction of the mayor, or of the mayor, commonalty, and citizens of the city of London, to, in, and upon the river of Thames aforesaid, other than and except to remove any shelf or shelfs, or to deepen or widen the said river where the said bridge shall be built, and to do every other matter and thing as shall or may be necessary for the erecting and maintaining the said bridge."

15. By the Act 1 G. 2, c 18, for explaining and amending the Act above referred to, it is by s. 1 enacted as follows,—"The commissioners and trustees appointed by the said recited Act, and those appointed by this Act, or any nine or more of them, and the commissioners and trustees when incorporated in pursuance of the said former Act, shall have and they have hereby full power and authority to contract and agree with any person or persons whatsoever, as well commissioners and trustees as others, to erect and build a bridge across the said river of Thames, from the said town of Fulham to the said town of Putney, and to repair, maintain, and support the same when built, in such manner as by the said commissioners and trustees or corporation aforesaid shall be judged proper; and the said commissioners and trustees or corporation aforesaid, or any nine or more of the said commissioners and trustees before such incorporation, have hereby power and authority to grant any annuity or annuities in fee out of the profits, incomes, revenues or tolls of the said bridge in such manner as *they may
*126] by the said former Act grant any other annuity or annuities; all which annuities in fee to be granted pursuant to this Act shall be registered, and shall be assignable and devisible as the said other annuities are by the said former Act; *and such annuities in fee shall be deemed personal estates, and shall go as such.*"

16. And, for the more effectual enabling the said commissioners and trustees and corporation aforesaid as speedily as may be to complete and perfect the said work, by s. 3 it is enacted that "it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey and assign over in perpetuity, or otherwise, all or any tolls, revenues, profits, or incomes of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do to the satisfaction of the said commissioners and trustees and corporation aforesaid; anything herein or in the said former Act to the contrary, notwithstanding."

17. By s. 5 it is enacted that "it shall not be lawful for the said commisssioners and trustees or corporation to erect or build the said bridge, or any part thereof, before or until full and ample satisfaction be made for all such prejudice, loss, or damage as shall or may be sustained or suffered by any of the proprietors of the horse-ferries between the said towns of Putney and Fulham, unless the proprietors of the said ferries by writing under their respective hands and seals shall consent and
*127] agree with the said commissioners and *trustees, or any nine or more of them, or the said corporation, to permit the said commissioners and trustees or corporation to build the same before such satisfaction shall be made; and, in case such consent of the said proprietors shall be had and obtained in manner aforesaid, that then the said bridge, when built, and all tolls, revenues, profits, and incomes belonging or to belong to the same shall be and are hereby made chargeable and charged, in the first place, with all such sums of money as are by the said former Act to be paid to the respective owners, proprietors, and persons interested in the present ferries between Fulham and

Putney aforesaid; and that, upon payment thereof respectively, or tender and refusal, all ownerships, properties, and interests of, in, or to the horse and foot ferries between Fulham and Putney aforesaid shall be and are hereby extinguished and determined, and the said ferries and passage over the river of Thames there, *and the ground and soil adjacent and belonging to the said respective ferries*, shall be and are by the authority of this Act transferred to and absolutely vested in the said commissioners and trustees and corporations aforesaid and their successors and assigns for ever." All such moneys and payments for the said horse-ferries have long since been duly paid and made.

18. Copies of both of the Acts above referred to accompanied the case and were to be taken to be and form part of the same, for the purpose of reference or otherwise.

19. The ferries referred to in the said Acts on the Putney side of the river were held and were parcel of the manor of Wimbledon, and on the Fulham side were held and were parcel of the manor of Fulham; and, previously to the 21st of March, 1728, Daniel Pettiward and William Skelton had been respectively admitted to and each of them then held in fee by copy *of the court rolls of the respective manors, one undivided moiety of the ferries on both the Putney and Fulham [*128 sides of the river; and on that day the commissioners paid to them the sum of 8000*l.* in full satisfaction for all damage which they or either of them should sustain by occasion of building the said bridge,—the rights and interests of all other parties in the said ferries having been previously satisfied by the commissioners.

20. On the 19th of November, 1728, a contract was duly entered into by the commissioners with thirty persons who had subscribed 1000*l.* each for building the bridge and making the purchases and payments required by the said Acts, by which those thirty persons contracted to build and maintain the bridge and the ways and passages thereto, and make the said purchases and payments: and, in pursuance thereof, the said thirty persons did build the said bridge and make the said payments and purchases.

21. By indenture of bargain and sale bearing date the 11th of November, 1729, duly enrolled in Chancery, made between the said commissioners of the first part, the said thirty persons therein named, and described as being all the contractors and subscribers for building the said bridge, of the second part, and certain other persons as trustees of the third part,—after reciting the 1st, 2d, 5th, 7th, 10th, 11th, 12th, 16th, 17th, 18th, and 19th sections of the Act first above mentioned (12 G. 1, c. 36), and the 1st, 3d, and 5th sections of the Act secondly above mentioned (1 G. 2, c. xviii.); and further reciting the said contract of the 19th of November, 1728, and that the said thirty persons had paid all moneys they had agreed to pay, and built the said bridge,—the commissioners granted, bargained, sold, assigned, and set over unto the said persons parties thereto of the third part, their heirs and [*129 *assigns for ever, the said bridge, and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge so built from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and erected as occasion might be, according to the provision in that behalf made by the said recited Acts, or either of them, or which should

in anywise arise, accrue, or belong to the same, *with all such ground and soil adjacent and belonging to the then late or then present horse-ferries* and passage over the said river between Fulham and Putney as had been, was, or should be vested in the said commissioners, and all benefits, advantages, powers, privileges, and authorities, and every other matter and thing whatsoever vested in or granted to the said commissioners, which they were empowered or capable to assign and convey over by virtue of the said Acts or either of them; To hold the same unto and to the use of the said trustees, parties thereto of the third part, their heirs and assigns for ever, upon trust to permit and suffer the said thirty persons therein named of the second part, their heirs and assigns, to receive and take the said tolls, revenues, profits, and income, and to have the sole management and direction thereof, upon condition that they should thereout pay certain sums of money and expenses specified in the said deed (which condition has been performed), and, after payment of such sums of money, should every year thereafter divide all the then rest and residue of the moneys to be raised by the said tolls, revenues, profits, and income of the said bridge, ferries, and other the premises (if any), unto and amongst the said thirty subscribers and proprietors for the time being, and their respective heirs and assigns, rateably and proportionably, according to the several sums of
*130] money by them subscribed for the *purposes aforesaid, and to their several and respective rights, shares, and interests of, in, and to the same, to have, take, and enjoy the same as tenants in common, and not as joint tenants. And, by the same deed, it was provided, that, in case the tolls, revenues, profits, and incomes of the said bridge or ferries should at any time or times thereafter fall short and not be sufficient to answer and make good all such sums of money as should be requisite for putting and keeping the said bridge, together with the ways and passages to and from the same, in good repair within a reasonable time to be allowed for making such repairs, or should not be sufficient for the payment of all the matters and things thereinbefore particularly mentioned, and the charges of the trustees in the execution of the trusts, then all sums of money as should so fall short or be wanting for the said purposes should from time to time be paid and borne by the said thirty subscribers, the parties thereto of the second part, their heirs and assigns, rateably and proportionably, and according to the several sums of money subscribed by them respectively towards the purposes aforesaid, and to their several rights, shares, and interests therein.

22. On the 16th of June, 1730, by grant of that date, the Archbishop of Canterbury granted to the proprietors of Putney Bridge two hundred superficial feet of land, part of the churchyard of Putney, for the purpose of making the passage to and from the said bridge more commodious; and the same was used for that purpose, and now forms part of the approach to the said bridge.

23. There is no other land in the county of Surrey vested in, belonging to, or claimed by the said proprietors, except what is comprised in the before-stated deed of the 11th of November 1859 and the
*131] last-mentioned grant; and no evidence was adduced before *the revising barrister as to the annual value of the said land.

24. On the 26th of August, 1736, by deed of that date, the persons then equi ably entitled to the tolls, revenues, profits and income of

the bridge under the indenture of the 11th of November, 1729, covenanted with each other that certain orders and directions given for the arrangement of the affairs of the bridge should stand good until altered at some quarterly general meeting of persons from time to time becoming so equitably entitled, by a majority of such persons present at such meeting.

25. The interest of the present shareholders in the bridge is identical with the interest vested in the said thirty persons or proprietors under the said deed of the 11th of November, 1729, and under the grant of the 16th of June, 1730, and has always been conveyed and transmitted as and dealt with as freehold estate: and the shareholders of the said bridge are about eighty in number.

26. The proprietors meet once a year, and select a committee of six out of their own body to manage their affairs.

27. The said persons objected to are respectively the holders of a share or part of a share of such interest as aforesaid: and the sufficiency of the annual money value of such share or part of a share is not now in dispute.

28. The bridge is built partly upon piles driven into the bed of the river, and at either end upon brick foundations which stand respectively upon that part of the banks between high and low water mark whence formerly the ferries used to ply from side to side, and in part upon land which formerly was ground and soil adjacent and belonging to the said ferries.

29. There are toll-houses at each end of the bridge, *at which tolls are collected; and each of them is a structure of brick, [*132 and stands upon the brick foundations of the bridge referred to in the preceding paragraph.

30. For the said persons objected to, it was contended that they had respectively under or by virtue of the said Acts of Parliament and deeds of the 10th of November, 1729, and 16th of June, 1730, hereinbefore stated, such equitable freehold estates in the said bridge, tolls, and other property comprised in the said acts and deeds, as entitled them respectively to be on the list of voters for the said eastern division of the said county: and, for the said David Nichols, the objector, it was contended that they had not respectively such equitable freehold estates as would entitle them to vote for the said division of the said county; and also that the shareholders were a company, and that the individual shareholders, being only entitled to a share of the receipts and profits, were not entitled to be on the said list of voters.

The revising barrister decided, in favour of the said David Nichols, that the said several persons objected to had not respectively such equitable freehold estates as entitled them respectively to be on the said list of voters, and he accordingly expunged their names from the said list.

If his decision was wrong, the names of the said persons objected to were to be restored and inserted on the register for the parish of Putney.

Karslake, Q. C. (with whom was *Beresford*), for the appellant.—Under the Acts of Parliament referred to in the case,—12 G. 1, c. 36, and 1 G. 2, c. 18,—the commissioners for building Putney Bridge had

an interest in the soil which belonged to the ancient ferries, upon
*133] which the abutments of the bridge were built; and *they having, by the deed mentioned in the 21st paragraph of the case, assigned all their interest therein to trustees for the shareholders, the latter are entitled to vote. That the soil vested in the commissioners, is clear from the 5th section of the second Act, which enacts that "all ownerships, properties, and interests of, in, or to the said ferries between Fulham and Putney shall be extinguished and determined, and the said ferries and passage over the river of Thames there, *and the ground and soil adjacent and belonging to the said respective ferries*, shall be and are by authority of this Act transferred to and absolutely vested in the said commissioners and trustees and corporation aforesaid, and their successors and assigns for ever." Under the trusts of that deed the cestui que trusts took an equitable interest in the land, and not merely a right to a share of the profits arising from the tolls. The trustees have a mere naked trust, with no active duties to perform: and the case states (par. 25), that the interest of the shareholders has always been conveyed and transmitted as and dealt with as freehold estate. In Foster's Case, 2 Peck. 105, these shares were held to confer a vote for Middlesex. In Baxter, app., Newman (or Brown), resp., 8 Scott N. R. 1019, 7 M. & G. 198 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 287, A., B., C., and D. joined in partnership to work a fulling-mill. Money was subscribed by all the partners; with part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was built on the land, and machinery for the mill was purchased. By a partnership deed executed by A., B., C., and D., the trusts of the land, mill, &c., were declared to be (amongst other things) that A. and B. should stand seised and possessed of all the estates, property, goods, &c., upon trust for the benefit of themselves and their partners as part of their partnership
*134] joint stock in *trade: there was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the copartnership; and it was declared that the land, mill, &c., should be deemed and considered as or in nature of personal estate and not real estate, and be held in trust for the partners as part of their partnership stock in trade. And it was held that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership, and was entitled to be on the list of voters for the county. That case very much governs this. Bennett, app., Blain, resp., 15 C. B. N. S. 518 (E. C. L. R. vol. 109), 1 Hopw. & Ph. 35, will probably be relied on for the respondent. But there the land was vested in trustees, who had active trusts to perform, and the shareholders in the Company had only a right to a share of profits.

Raymond, for the respondent.—The real question is, whether the persons who claim to be registered in respect of their shares in the tolls of this bridge have any freehold interest in any lands or tenements. The case does not find that the owners of the ancient ferries had any land: nor was it necessary that they should have. The intention of the Legislature in passing these acts, was, to enable the commissioners to purchase the interest in the old ferry, and to build a bridge; it never intended to convey to them larger powers than

were necessary for that purpose. No portion of the bed or soil of the river was vested in them; otherwise there would have been no necessity for the 17th section of the 12 G. 1, c. 36, which enacts "that all stones, bricks, planks, piles, and other materials which shall be made use of for or towards building or making the said bridge in or about the same, or for maintaining, repairing, or supporting the same, or for *making the said river deeper as aforesaid, shall always be deemed to belong and appertain to the commissioners and corporation aforesaid." [*135 The cases are numerous to show that the Courts will not construe Acts of Parliament as conveying more than is necessary for the carrying out of works of this sort. This was clearly laid down in Badger *v.* The South Yorkshire Railway and River Dun Company, 1 Ellis & Ellis 347 (E. C. L. R. vol. 102). Where a mere easement will suffice, nothing more passes: Lancaster *v.* Eve, 5 C. B. N. S. 717 (E. C. L R. vol. 94).

Then, supposing that there was some interest in land in the commissioners, it was not and could not be conveyed simpliciter to the claimants, the shareholders in this bridge. The 3d section of the 1 G. 2, c. 18, enacts that "it shall and may be lawful to and for the said commissioners and trustees, or any nine or more of them, before incorporated, and also lawful for such corporation when created, at any time or times to convey and assign over in perpetuity or otherwise *all or any tolls, revenues, profits, or incomes* of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair, and shall give sufficient security so to do, to the satisfaction of the said commissioners and trustees and corporation aforesaid." As we have here the origin of the title, we cannot assume anything from user. The way in which the power so conferred upon the commissioners is carried out appears from the deed set out in the 21st paragraph of the case, by which they convey to the trustees, their heirs and assigns for ever, "the said bridge, and all the materials wherewith the same was erected and built, and all tolls, revenues, profits, and incomes of or belonging to the said bridge *so built from the town of Fulham to the town of Putney, or the ferries thereafter to be set up and [*136 erected as occasion might be, according to the provision in that behalf made by the said recited Acts or either of them, or which should in anywise arise, accrue, or belong to the same, with all such ground and soil adjacent and belonging to the then late or then present horse-ferries and passage over the said river between Fulham and Putney, as had been, was, or should be vested in the said commissioners, and all benefits, advantages, powers, privileges, and authorities, and every other matter and thing whatsoever vested in or granted to the said commissioners, which they were empowered or capable to assign and convey over by virtue of the said Acts or either of them,"—to be held by them upon certain trusts. [ERLE, C. J.—The trustees have nothing to do. The shareholders are to keep up the bridge. If the land were vested in the parties of the third part as bare trustees, the shareholders would take equitable freeholds.]

Then, these persons form a company, and that brings the case

within the principle of Bennett, app., Blain, resp., 15 C. B., N. S. 518 (E. C. L. R. vol. 109). Erle, C. J., there says, p. 531,—"The deed shows how the land was to be held,—the legal estate to be vested in trustees for ever. The committee of management was by means of rents and subscriptions to make profits out of the undertaking, and, after payment of expenses and outgoings, to divide the surplus amongst the shareholders. The effect of that deed in my opinion is, to give to each shareholder a right to his share of the profits, but not to confer upon him any right in the land which is vested in the trustees. It is clear that that was the intention of the deed. The declaration that the shares are to be deemed personal estate only, the mode of *137] transfer, which is inconsistent with the rules of law as *to the transfer of real estate, and the whole tenor of the deed, seems to constitute a sort of interest which is well known and has frequently been the subject of consideration in dealing with joint stock companies." [KEATING, J.—All the right the shareholder there had was to a place in the exchange, which might be varied by the committee. The only absolute interest he had was in a share of the profits. Besides, the trustees had active trusts to perform.] The nature of rights of this description was very much discussed in Bligh *v.* Brent, 2 Y. & C. Eq. Exch. 268.† In delivering the judgment of the Court there, Alderson, B., says, p. 295,—"It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted, the powers that body has over it, and the purposes for which these powers are given. The property is money, the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time: and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments), whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers, having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the sub- *138] scribers *depended on the mode of management by the independent body? And yet that is, in truth, this case; for, the individual members of a corporation are quite as distinct from the metaphysical body called 'the corporation' as any others of His Majesty's subjects are." So, here, the only right which each subscriber or shareholder has, is, a right to receive a share of the profits arising from the tolls: there is nothing in which each can claim a share as tenants in common. [ERLE, C. J.—If they are owners in fee simple of the bridge, their obligation to the public to repair it makes no difference.(*a*)] It is submitted that they have no such

(*a*) His Lordship referred to The King *v.* The Mayor, &c., of Stratford-upon-Avon, 14 East 348.

interest in any lands or tenements as to confer upon them a right of voting.

Karslake, Q. C., in reply.—Bennett, app,, Blain, resp., 15 C. B. N. S. 518 (E. C. L. R vol. 109), 1 Hopw. & Ph. 35, has no application to a case of this sort. Baxter, app., Newman (or Brown), resp., 8 Scott N. R. 1019, 7 M. & G. 198 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 287, is more to the purpose, and shows that the cestui que trusts, the shareholders, took an equitable freehold interest in the land conveyed to the trustees. Bligh *v.* Brent, 2 Y. & C. Eq. Exch. 268,† shows that the circumstance of the shares being declared to be personal property will not alter their legal character, or affect the rights of the shareholders. The annuities and other securities to be granted are in both Acts (s. 14 of 12 G. 1, c. 36, and s. 1 of 1 G. 2, c. 18) declared to be personal property. But for those provisions, both Acts assume that they would be real estate. The provision in s. 5 of the first Act, for the purchase of houses and land for making the necessary approaches to the bridge, and the provision in s. 7, enabling the commissioners to acquire, hold, and *convey lands, clearly show that they took something more than a mere easement. [ERLE, C. J.— Generally speaking, a ferryman has no freehold, but only an easement, in the approaches to his franchise.] The provisions last referred to would have been wholly unnecessary if these commissioners took an easement only. There has, besides, been complete and uninterrupted possession here ever since the date of the conveyance in 1729. That of itself is abundant evidence of title. The case of Lancaster *v.* Eve, 5 C. B. N. S. 717 (E. C. L. R. vol. 94), turned upon whether the pile which was the subject of the action had been put into the bed of the river under circumstances which deprived the person placing it there of the ownership of the chattel: looking at all the facts, the Court held that it had not. But this bridge can hardly be considered to be a chattel. Then, as to the equitable interest. As the cestuis que trust must necessarily be a fluctuating body, it was found convenient to have a body of trustees in whom the legal interest would vest. But the trust was the lowest that could well be conceived: the trustees had no duties to perform, and incurred no liability; the whole affairs of the bridge were under the management of a committee. The shareholders took all the interest in the profits, and therefore have an equitable interest in the land, in respect of which they were entitled to be registered for the county in which the land is situate. *Cur. adv. vult.* [*139

ERLE, C. J., now delivered the judgment of the Court: —

This was a claim on the part of the shareholders of a bridge which crosses the river Thames between Fulham and Putney to be placed upon the register for the eastern division of the county of Surrey, in respect of a *freehold interest in shares in the bridge: and the main question is whether they have an equitable freehold therein. It appears that the statute which authorized the building of the bridge, 12 G. 1, c. 36, appointed certain commissioners, and empowered them to purchase and hold lands for the purpose of carrying out the work; and that the commissioners, acting in the supposed pursuance of the Act, by indenture of bargain and sale of the 11th of November, 1729, conveyed to trustees in trust for thirty persons [*140

who had subscribed the capital for acquiring the rights and building the bridge, all the materials of the bridge, and all tolls, revenues, profits, and income belonging thereto, with all such ground and soil adjacent and belonging to the ferries between Fulham and Putney (which they had acquired under the powers of the Act), as were or should be vested in the commissioners, and all benefits, &c., and every other matter and thing whatsoever vested in or granted to the said commissioners which they were empowered or capable to assign or convey over by virtue of the Acts of Parliament. If the commissioners had power to part with any land vested in them by the Acts or either of them, no doubt the shareholders would take an equitable interest under that conveyance. But I take it to be perfectly clear law, that, where an Act of Parliament vests land in commissioners for public purposes, unless there be some special authority to that effect in the Act they have no power to part with the land. I see nothing here to warrant the commissioners in conveying away any land. The 3d section of the 1 G. 2, c. 18, confirms this view. It authorizes the commissioners and trustees(*a*) at any time or times "to convey and
*141] assign over in perpetuity or otherwise all or any *tolls*, **revenues*, *profits, or incomes* of or belonging to the said bridge or ferries, or which shall in anywise arise, accrue, or belong to the same, unto such person or persons as will undertake, contract, and agree to erect and build the said bridge, and to preserve and keep up the same in good and sufficient repair," &c. That is a power to the commissioners to assign the tolls and profits of the bridge as distinguished from the fee simple of the land. I therefore think the commissioners had no power to convey any interest in any land to the shareholders, or to any trustees for them. Although they profess to convey it by the deed of 1729, yet, if the law has prohibited it, the shareholders, taking the conveyance with knowledge of the limited powers of the commissioners, would take no more, and the commissioners would part with no more, than the law entitled the latter to convey. The result is, that, in our judgment, no interest in the land passed by that conveyance, but a mere right to take the tolls; and consequently we hold that the decision of the revising barrister was right.

As, however, the case was one of some doubt, we think the decision should be affirmed without costs. Decision affirmed.

MEMORANDUM.

THE days appointed for hearing the registration appeals for Michaelmas Term, 1864, being found insufficient and there remaining on the last day but two of the term three cases to be argued, and two standing for judgment, besides a rule pending for striking out one, the Court were pressed by counsel to dispose of the list during the two remaining days,—it being suggested that otherwise, in one event,
*142] parties might be *improperly disfranchised. The Lord Chief Justice, however, after referring to the several clauses of the 6 & 7 Vict. c. 18 by which the hearing of these cases is regulated,

(*a*) *i. e.*, the commissioners and trustees named in the 12 G. 1, c. 36, s. 1.

thought there was no reason why other pressing business of the Term should be postponed on that account.

There seems to be no foundation for the suggestion that any serious inconvenience could result from the postponement of these appeals until a subsequent term.

By s. 62, the appellant is required, within the first four days of Michaelmas Term, to transmit the case to the Masters of the Court of Common Pleas with notice of his intention to prosecute the appeal; and he is to give a similar notice to the respondent. The Court is then (by s. 63), *as early as conveniently may be*, either in Term time or in Vacation, to appoint days for hearing and deciding such appeals. There is no other limit of time.

The formation of the register is provided for by ss. 47–49. By s. 47, the list of voters for the county, signed by the barrister as directed by s. 41, is to be *forthwith* transmitted by him to the clerk of the peace of the county; and, in like manner, by s. 48, the lists of voters for each city or borough, signed as aforesaid, are to be *forthwith* transmitted to the town clerk, and the clerk of the peace, or the town clerk, is *forthwith* to cause the lists to be copied *and printed* in a book; which books, signed respectively by the clerk of the peace and the town clerk, are to be delivered to the sheriff of the county, or the returning officer of the city or borough, *on or before the last day of November*, and are (by s. 49) to be the register of voters until the 1st of December in the succeeding year.

Any alterations which may be rendered necessary by the decisions of the Court of Common Pleas can *only be made *after the printed register has been sent to the sheriff or the returning officer.* [*143

The 67th section enacts, that, "whenever by any judgment or order of the said Court any decision or order of any revising barrister shall be reversed or altered, so as to require any alteration or correction of the register of voters for any county, or for any city or borough, notice of the said judgment or order of the said Court shall be forthwith given by the said Court to the sheriff or returning officer, as the case may be, having the custody of such register; and the said notice shall be in writing under the hand of one of the Masters of the said Court, and shall specify exactly every alteration or correction to be made in pursuance of the said judgment or order in the said register; and such sheriff or returning officer respectively shall, upon the receipt of the said notice, alter or correct the said register accordingly, and shall sign his name against every such alteration or correction in the said register, and shall safely keep and hand over to his successors every such notice received by him from the said Court as aforesaid, together with the said register."

And by s. 69 it is provided that "no right of voting at any election of a member or members to serve in Parliament shall be affected by any appeal pending in the said Court at the time of the issuing of the writ for such election; but it shall be lawful for every person to exercise the right of voting at such election as effectually, and every vote tendered thereat shall be as good, as if no such appeal were pending; and that the subsequent decision of any appeal which shall be pending in the said Court at the time of the issuing of the writ for any such election, shall not in any way whatsoever alter or affect the poll taken at such election, nor the return made thereat by the returning officer."

HILARY TERM, 1865.

KENT.—Eastern Division.

HENRY SMITH, Appellant; FREDERICK FOREMAN, Respondent. *Jan.* 12.

A. occupied solely as tenant a house and land at a yearly rent of 40*l.* He also jointly with his father rented and occupied other lands at a yearly rent of 64*l.* Both occupations were under the same landlord:—Held, that A.'s proportion of the joint rent could not be added to his separate rent, so as to constitute a qualification to vote for the county under the 2 W. 4, c. 45, s. 20.

1. AT a Court held at Ashford, in the eastern division of the county of Kent, for the revision of the list of voters for the parish of West Brabourne, Henry George Allen duly objected to the name of John Rolfe being retained on the list of voters for the said parish.

2. The facts of the case are these:—The name of John Rolfe appeared on the copy of the register of persons entitled to vote, as follows,—"John Rolfe, West Brabourne, Occupation of house and land, West Brabourne:" and his name had stood on the register thus for several previous years. John Rolfe had during the qualifying period, and for several previous years, occupied solely, as tenant, a house and land at West Brabourne, for which he was bonâ fide liable to a yearly rent of 40*l.* He had also occupied during the qualifying period, and for several previous years, as tenant, jointly with his father, under the same landlord, other land three-fourths of which were also in West Brabourne, and about one-fourth in a neighbouring parish, also within the said eastern division, for which he and his father were bonâ fide jointly liable to a rent of 64*l.* per annum. The hiring of these latter named lands was at a different and subsequent period from the hiring of the first-mentioned house and land, of which John Rolfe was sole tenant.

*145] *The revising barrister decided, that, inasmuch as the occupation and holding of the joint tenant is per tout, as well as per mi, and that John Rolfe was actually bonâ fide liable to pay to one landlord a yearly sum as rent exceeding 50*l.* (that is to say, 40*l.* for his sole occupation, and 32*l.* at least as his bonâ fide share of the rent for the joint occupation) for the lands and other tenements holden and occupied by him as aforesaid, he was entitled to be retained on the list of voters, by virtue of the 20th section of the 2 W. 4, c. 45, which enacts "that every male person of full age, who shall occupy as tenant any lands or tenements for which he shall be bonâ fide liable to a yearly rent of not less than 50*l.*, shall be entitled to vote:" and he retained his name on the list of voters accordingly.

If the Court should be of a contrary opinion, the name of John Rolfe was to be expunged from the register of voters for the eastern division of the county of Kent.

The Hon. R. Bourke, (with whom was *Hayes*, Serjt.), for the appel-

lant.—This person claims to be entitled to the franchise, partly in respect of the occupation as tenant of premises of the yearly value of 40*l.* (under the 20th section of the Reform Act), and partly in respect of the occupation jointly with his father of other premises under the same landlord, of the yearly value of 64*l.* (under the 73d section of the Registration Act). It is submitted that these two occupations cannot be joined together, so as to constitute one qualification as tenant of premises of the yearly value of 50*l.* The 20th section of the 2 W. 4, c. 45, enacts that "every male person of full age, and not subject to any legal incapacity," "who shall occupy as tenant any lands or tenements for which he shall be bonâ fide *liable to a yearly rent of not less than 50*l.*, shall be entitled to vote," &c. [*146 Rolfe clearly acquired no franchise under that section. Then, the 73d section of the 6 & 7 Vict. c. 18, after reciting the last-mentioned provision, enacts, that, "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be bonâ fide liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a bonâ fide rent of not less than 50*l.* for each and every occupier, but not otherwise." Rolfe acquired no franchise under that section; for, his share of the rent was only 32*l.* The question is, whether two separate and distinct tenancies can be joined for the purpose of making up the necessary qualification. The matter is virtually disposed of by the judgment of Tindal, C. J., in Gadsby, app., Barrow, resp., 8 Scott N. R. 799, 7 M. & G. 21 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 142. Commenting on the words "a yearly rent of not less than 50*l.*," in the 20th section of the Reform Act, he says: "These words, as it appears to me, not only in their grammatical construction, but also in their legal sense, import a liability to a *single* yearly rent of not less than 50*l.* If the Legislature had intended a qualification that might be compounded of divers rents, it was easy for them to say 'a yearly rent or rents amounting in the whole to not less than 50*l.*' In furtherance of this construction of the Act, observe to whom the same section has given the right to vote in the two other instances referred to. First, it gives a right to vote to 'every male person of full age, and not subject to any legal incapacity, who shall be entitled, *either as lessee or assignee, to any lands or tenements, whether of freehold or of any other tenure whatever, for the unexpired residue, whatever it may be, of *any term* originally created for a period of not less than sixty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 10*l.* over and above all rents and charges payable out of or in respect of the same.' There can be no doubt but that that right can only be acquired in respect of *a single term* of the required value; and that a person entitled to an unexpired residue of two or more terms of smaller annual value, but amounting in the aggregate to a greater yearly value than 10*l.*, would not thereby gain a vote. So, in the second branch of the clause, a right of voting is given to persons in like manner entitled 'for the unexpired residue, whatever it may [*147

be, of *any term* originally created for a period of not less than twenty years (whether determinable on a life or lives or not), of the clear yearly value of not less than 50*l.* over and above all rents and charges payable out of or in respect of the same:' there again we have a description of a person entitled to vote in respect of a *single term*. Now, there can be no reason why the Legislature should in the third instance have intended to confer the franchise in respect of several lettings, when in the two former they clearly contemplated a single term; for, there could be no ground for allowing a tenant under a parol demise *to make up his qualification of different rents*, and to withhold the same advantage from one claiming in respect of different terms. Looking, therefore, at this section alone, I have no hesitation in saying, that, as well in grammatical as in legal construction, it confers the right to vote only in respect of the liability to a *single yearly rent* of not less than 50*l.*" This is not a single rent. [WILLIAMS, J.—The 73d section speaks of premises jointly rented *and occupied by more persons than one, at a rent of not less than 50*l.*: it does not say, in conjunction with any other land.] No. You cannot tack a joint tenancy to a sole tenancy, for the purpose of ekeing out a qualification.

Hannen (with whom was *Underdown*), for the respondent.—There can be no objection to a qualification made up of two holdings under the same landlord. In Gadsby, app., Warburton, resp., the building and the land were held under different landlords: and the language of Tindal, C. J., must be understood with reference to the facts of the particular case before him. [KEATING, J.—Has it ever been decided that two separate buildings held under the same landlord may be joined for the purpose of constituting a qualification?] No. The subject has been considered: see Elliott on Registration, 2d edit. p. 174.(*a*) [WILLIAMS, J.—But for the 73d section of the 6 & 7 Vict. c. 18, it is clear that this person could not be registered.] That is conceded. The 26th section of the 1 & 2 W. 4, c. 60, for the better regulation of vestries, enacts that the vestry elected under the Act in any parish not within the metropolitan police district, or the city of London, shall *consist of resident householders rated or assessed to the relief of the poor upon a rental of not less than 10*l.*; and that no person shall be capable of acting as one of the said vestry unless he shall be the occupier of a house, lands, tenements, or hereditaments rated or assessed upon the aforementioned amount of rental within the parish for which he is to serve: provided always, that, if the parish adopting this Act should be within the metropolitan police district, or the city of London, or if the resident householders therein should amount to more than 3000, then and in that case the vestry elected under this Act shall consist of resident house-

*148]

*149]

(*a*) See Powell, app., Price, resp., 4 C. B. 105 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 586. There, A. occupied a shop, which, together with a house and other premises also occupied by him, constituted a sufficient qualification in point of value, but neither being sufficient alone. The shop was separated from the rest of the premises by a yard in the exclusive occupation of A., but there was no complete curtilage or fence surrounding the whole; the yard being approached by a passage at the side of the shop, open to the street, which was also the property of A., but used by the tenant of the adjoining house in common with him. And it was held that the shop could not be joined with the other premises, so as to constitute one entire qualification under the 2 W. 4, c. 45, s. 27.

holders rated or assessed to the relief of the poor of such parish upon a rental of not less than 40*l.* per annum. In The King *v.* The Churchwardens, &c., of St. Pancras, 1 Ad. & E. 80 (E. C. L. R. vol. 28), 3 N. & M. 425 (E. C. L. R. vol. 28), it was held that the rental might be made up of tenements separately held, and not in the occupation of the vestrymen. There can be no reason why the rental, if it is to be a test of responsibility, should be a *single rental:* nor can there be any good reason why a joint occupation should stand in a different position in this respect from a separate occupation. The question turns entirely upon the plain words of the Act: there is no authority to be found which reflects any light upon it.

Bourke was not called upon to reply.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case was wrong. The qualification under s. 20 of the Reform Act for one occupying lands or tenements as tenant, is, a yearly rent of not less than 50*l.* It appears that the claimant occupies solely as tenant a house and land at a yearly rent of 40*l.* He cannot, therefore, qualify without the aid of the 73d section of the Registration Act, which *provides for the qualification of persons occupying jointly. The words giving that qualification [*150 are peculiarly limited. They are, that, "where any such lands and tenements shall be jointly rented and occupied by more persons than one, each of such joint occupiers shall be entitled to be registered and vote in such election as last aforesaid in respect of the lands and tenements so jointly rented and occupied, in case the yearly rent for which they shall be bonâ fide liable in respect of such lands and tenements shall be of an amount which, when divided by the number of such occupiers, shall give a bonâ fide rent of not less than 50*l.* for each and every such occupier, but not otherwise." I do not feel myself at liberty to say that a qualification exists which is not to be found in the very plain words of that enactment. Here, the claimant rents jointly with his father lands in respect of which they are jointly liable to a yearly rent of 64*l.*, and he claims to have his proportion of that rent, viz. 32*l.*, added to his separate rent of 40*l.* to make up the 50*l.* qualification. But I am of opinion that the words of the section do not authorize the junction of these two rents. If the party claims in respect of his qualification as one of several joint occupiers, he must show a joint occupation at an amount which will give a bonâ fide rent of not less than 50*l.* for each of the joint occupants. If he fails to do so, he gains no qualification under the Registration Act. I do not profess to fathom the depths of the intention of the Legislature beyond the guide afforded by the clear language of the enactment. The 2 W. 4, c. 45, s. 20, in effect says that a person who occupies premises for which he is bonâ fide liable to a yearly rent of not less than 50*l.* shall be entitled to vote. Then comes the 73d section of the 6 & 7 Vict. c. 18, which says, that, if two or more shall jointly occupy, each shall be entitled to be registered in respect *of such joint occupation, provided the rent [*151 be sufficient in amount to give 50*l.* a year for each, but not otherwise. Possibly the Legislature may have thought it would be inconvenient to allow a qualification to be made up of the separate rent and an apportionment of the joint rent. But, be that as it may,

it seems to me that this person is not qualified under either statute, and consequently that his name must be expunged from the register.

WILLIAMS, J.—I am entirely of the same opinion. Giving to the language of the 73d section of the 6 & 7 Vict. c. 18, its ordinary construction, I think it is impossible to come to any other conclusion.

KEATING, J.—I am of the same opinion. But for the 73d section of the 6 & 7 Vict. c. 18, a joint occupation could not have given a qualification. I see nothing in the words of that section to warrant us in holding that a joint occupation which is of itself insufficient to give the right of voting, may be added to an imperfect qualification in respect of a separate occupation under the Reform Act.

Decision reversed.

---

*152] *Borough of CHELTENHAM.

JOHN FLATCHER, Appellant; WILLIAM BOODLE, Respondent. *Jan.* 14.

A. came into occupation of the qualifying premises in August. A poor-rate had been made in the preceding April, and another was made in September following. A. had paid the last-mentioned rate; but no demand had been made upon him for (nor had he paid or tendered) his proportion of the April rate, under the 17 G. 2, c. 38, s. 12, although it had not been paid by the outgoing tenant, whose name appeared upon that rate:—

Held by Erle, C. J., Willes, J., and Keating, J.,—dissentiente Williams, J.,—that A. had paid "all the poor-rates *which had become payable from him* in respect of the premises," within the meaning of the 2 W. 4, c. 45, s. 27,—the liability to pay the proportion of the April rate being only a liability subject to the contingency of the outgoing tenant having made default, and of the overseers demanding his proportion of the rate from A.

1. AT the Revision Court of the borough of Cheltenham, in the county of Gloucester, held on the 15th of September, 1864, to revise the parliamentary lists of voters for the said borough, which consists of only one parish, John Flatcher duly objected to the name of James Burrington being retained on the list of voters for the said borough, upon the ground that a portion of the poor-rate for the qualifying year had not been paid.

2. It was proved before the revising barrister that the poor-rates of the parish in which the qualifying premises are situated, are made half-yearly; that there was one made in April, 1863, which extended to the following September, when another was made which extended to March, 1864, in which month a new rate was made, which is the existing rate.

3. The voter went into occupation of the qualifying premises prior to the 1st of August, 1863, but paid no portion of the rate then in existence, which was not demanded of him; neither was his name inserted in that rate.

4. It was contended against the vote, that, inasmuch as the 27th section of the 2 W. 4, c. 45, requires the payment of all rates payable from the voter, he should have gone to the overseers and paid his proportion of the April, 1863, rate, to which he was rendered liable *153] *by the 12th section of the 17 G. 2, c. 38; and, if any dispute had arisen as to the amount, they could have had it settled by two justices in the manner provided by that section; and that, the

voter having failed to adopt this course, he was disqualified, for the omission was not remedied by any provision of the Registration Act, as s. 75 of the 6 & 7 Vict. c. 18, only applies to a misnomer or inaccurate or insufficient description.

5. It appeared to the revising barrister, that, as the Act of George 2 does not say the incoming tenant shall pay, but only that he shall be liable to pay, and as the proportion which he is so liable to pay must before he can pay it be first ascertained, either by agreement between the parties, or, in case of dispute, by the decision of two justices of the peace; and as, by the 6 & 7 Vict. c. 18, s. 75, a person in other respects qualified shall be considered as having paid all rates when he shall have bonâ fide paid all sums of money which he shall have been called upon to pay as rates,—therefore an unascertained proportion, which the voter had never been called upon to pay, was not such a rate as had become payable from him in respect of the qualifying premises, within the meaning of the 27th section of the 2 W. 4, c. 45: and he overruled the objection, and retained the name.

6. If the Court should be of opinion that he was wrong, the name of James Burrington was to be expunged from the list.

7. The validity of the objections in three other cases depended upon the same decision, and they were accordingly consolidated with the principal case.

Dowdeswell, for the appellant.—The question is, whether Mr. Burrington was disqualified from being on the list of voters for the borough of Cheltenham, by reason of the proviso in the 27th section of the 2 W. 4, c. 45, *that no person shall be registered unless he shall have been rated in respect of the premises occupied [*154 by him to all rates for the relief of the poor made during the time of such his occupation, nor unless he shall have paid on or before the 20th of July all the poor-rates and assessed taxes *which shall have become payable from him* in respect of such premises previously to the 6th of April then next preceding. The 11 & 12 Vict. c. 90, which enacts that "no person shall be required, in order to entitle him to have his name inserted in any list of voters for any city, town, or borough in England, to have paid any poor-rates or assessed taxes, except such as shall have become payable from him previously to the 5th of January in the same year, and that no person shall be entitled to be on any such list of voters, unless the poor-rates and assessed taxes payable from him previously to the 5th of January shall be paid on or before the 20th of July next following," and the 6 & 7 Vict. c. 18, s. 75, as to inaccurate statements in the rate, do not apply to a case like this. It is clear that the proportion of the rate made in April, 1863, accruing between the 1st of August, 1863, when Burrington's occupation commenced, and the month of September, when another rate was made, was payable from him, within the meaning of the 27th section of the Reform Act. The 12th section of the 17 G. 2, c. 38, enacts, that, "where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay

to such rate in proportion to the time that such person occupied the
*155] same respectively, in the same *manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace." This provision in the Reform Act has always been construed most strictly. [KEATING, J.—Does it appear from the case that the outgoing tenant has not paid this very rate?] It is not so stated in terms: but it never was suggested, nor is it very likely, that it has been paid. Assessed taxes are (by the 43 G. 3, c. 161, s. 23) *payable quarterly*, though, by the 48 G. 3, c. 141, the collectors are directed to collect them, and they are accordingly usually collected *half-yearly*. In Ford, app., Smedley, resp., 12 C. B. 622 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 203, a house-tax was *payable* on the 20th of December, 1851, but not *demanded* until the 11th of April, 1852, and the party assessed did not pay it until after the 20th of July: and it was held that he had not, within the meaning of the 11 & 12 Vict. c. 90, "paid on or before the 20th of July, all assessed taxes which became *payable* from him in respect of the premises previously to the 5th of January," and consequently that he was not entitled to be registered. That was an extremely hard case; for, no demand was or could be made on the party assessed until after the 10th of April. Bishop, app., Smedley, resp., 2 C. B. 90 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 384, shows that it is the duty of the party from whom a rate is due to pay or tender it.(*a*) This person never offered to pay any portion of the rate in question. He has not paid on or before the 20th of July all the poor-rates which had become
*156] *payable from him in respect of the premises previously to the 6th of April. The Registration Act has nothing to do with the matter. The 75th section,—after reciting the 2 W. 4, c. 45, s. 27, as to rating and payment of rates, and that "doubts have arisen how far any misnomer or inaccurate or insufficient description in a rate of the person occupying any such premises as in the said recited Act are mentioned, or any inaccurate description of the premises so occupied, has the effect of preventing any such person from being registered and entitled to vote in respect of such premises in any year,"—enacts, that, "where any person shall have occupied such premises as in the said recited Act are mentioned for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township during the time of such his occupation so required as aforesaid, and such person shall have bonâ fide paid, on or before the 20th day of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises, within the meaning of the said recited Act, and be

(*a*) That was the case of a claim to be rated: the party was doing an act to qualify himself to vote, and did not do it properly.

entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied, notwithstanding." In Moss, app., The Overseers of St. Michael, Lichfield, resp., 8 Scott N. R. 832, 7 M. & G. 72 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 184, it was held that that provision has reference only to inaccuracies of description. There, a father and son jointly occupied premises as *partners: the name of the father alone was inserted in the first two rates made within the year, and both were inserted in the third: all the rates were paid by the hand of the son: and it was held that this was not a rating of the son, within the 2 W. 4, c. 45, s. 27, nor an inaccurate or insufficient description of the person rated, within the 6 & 7 Vict. c. 18, s. 75. "The appellant," says Maule, J., "clearly was not rated within the 2 W. 4, c. 45, s. 27; and the 75th section of the 6 & 7 Vict. c. 18 only applies where there is an inaccurate or insufficient description of the party intended to be rated and called upon to pay the rate. If he were the party intended to be charged, and was called upon to pay and did pay the rate, the blunder would not vitiate the rating. But here the father was rated, and not the son." Here there was no inaccuracy or mistake. [*157

Campbell Foster, for the respondent.—This person was entitled to be registered. The liability of the incoming tenant under the 17 G. 2, c. 38, s. 12, is, to pay a proportionate part of the rate for the time of his occupation, provided the outgoing tenant has not already paid it. The case does not show that the last occupant did not pay. [ERLE, C. J.—If our decision was to turn upon that, we should send the case back for amendment.] If there be any portion of the rate due, and the incoming tenant be liable for it, the non-insertion of his name in the rate is an inaccurate or insufficient description of the person liable, within the 75th section of the 6 & 7 Vict. c. 18.(*a*) The case finds that no demand was made upon Burrington. How was he to know whether anything or what was to be paid by him? The cases as to assessed taxes are altogether inapplicable: the poor-rate is payable as *soon as it is allowed and published. Blakey *v.* Dixon, 2 Bos. & P. 321, was referred to. The Court called on [*158

Dowdeswell.—There is no uncertainty as to the amount which the incoming tenant is to pay: he is to pay in proportion to the time he has occupied. Id certum est quod certum reddi potest. [WILLES, J.—It may be that there is a dispute as to when his occupation began. It is not a sum payable from the party until the amount is ascertained.] If there be any doubt, that is to be settled before the justices. The Act of Parliament imposes upon the occupier the duty of paying the rates; he is not to wait for a demand. The parish officers have no means of knowing when the occupation commences: the party himself has. [ERLE, C. J.—How can the incoming tenant know what has been done by the outgoing tenant? The utmost that can be said is, that the former has a capacity to be made liable.]

Campbell Foster.—This man has paid all the rates which had become payable from him, within the 2 W. 4, c. 45, s. 27. He has paid the September rate; and, if the collector had at that time made a demand on him for his proportion of the April rate, defining the sum, and he

(*a*) *Quære.* See Rogers, app., Lewis, resp., 7 C. B. N. S. 29 (E. C. L. R. vol. 97).

had refused to pay it, there would have been something in the argument. No sum could be payable from him, unless it was defined and ascertained. He was not absolutely liable, but only upon the contingency of his being resorted to on the default of the outgoing tenant. The 28th section of the Reform Act gives the right of voting in the case of different premises occupied in immediate succession, the party "having paid on or before the 20th of July all the poor-rates and assessed taxes which shall previously to the 6th of April then next preceding have *become payable from him in respect of all such premises so occupied by him in succession." In Rogers, app., Lewis, resp., 7 C. B. N. S. 29 (E. C. L. R. vol. 97), K. & G. 279, it was held that, in the case of an occupation of premises in succession under that section, it was not necessary that the party's name should appear on the rate: it is enough that he has *paid* the rate. Bishop, app., Smedley, resp., 2 C. B. 90 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 384, turned upon the 30th section of the 2 W. 4, c. 45, which was designed to meet the case of a man whose name had been altogether omitted from the rate. As the party had neither paid nor tendered the amount of the rate, it was held that he was not entitled to be registered. The claimant here has paid all that he has been called upon to pay, and all in respect of which a direct liability is imposed upon him by the Legislature; and, if necessary, he is entitled to rely upon the curative power of the 75th section of the 6 & 7 Vict. c. 18.

*159]

Dowdeswell, in reply.—Mr. Burrington claims to be retained on the list of voters in respect of a supposed right conferred on him by reason of the performance of two conditions contained in the 27th section of the Reform Act,—first, that he shall have been rated to all rates for the relief of the poor made during the time of his occupation of the qualifying premises,—secondly, that he shall have paid on or before the 20th of July all the poor-rates, &c., which shall have become payable from him in respect of such premises previously to the 6th of April. The second of these conditions is independent of the first, and is intended to be more extensive. Has it been complied with? It is submitted that it has not. A portion of the April, 1863, rate was clearly payable by Burrington. Though not defined or ascertained, he was liable for it. It was capable of being readily ascertained. He might and *ought to have tendered what he conceived to be the proper sum; and, if the overseers had refused to receive it, an appeal to two justices would have at once settled the matter. If the name of a party be omitted from the rate, it is his duty to demand to be rated: if he fails to do so, he loses his franchise. So, as to payment: being liable to pay, and not paying or tendering, he has failed to perform his duty to the public, and his right to vote is gone. [ERLE, C. J.—The liability here is somewhat like the liability of the drawer or endorser of a bill of exchange,—a contingent liability to pay, provided he has due notice of the default of the party primarily liable. Can it be said that the bill has become payable by him unless he has had notice?] The law merchant can hardly be relied on to assist the construction of the Reform Act. [WILLES, J. —In order to deprive a party of the benefit of a condition, he must have notice. How can a man know whether or not he is liable to

*160]

pay until he has notice of the demand upon him?] This is not a contingent liability at all. The rate being unpaid, it is a debt; and it became payable by Burrington immediately upon his entering upon the occupation of the premises.

ERLE, C. J.—The question raised by this appeal is, whether the claimant is disqualified from being placed upon the register by reason of the non-payment of a poor-rate payable from him in respect of the qualifying premises. The revising barrister held that the party was not disqualified. The facts are, that the voter went into occupation of the qualifying premises prior to the 1st of August, 1863, and that the practice in this parish was to make rates for the relief of the poor half-yearly, viz., in April and September. The voter had paid every rate made during the period of his occupation. When he entered upon the premises *in July, there was a portion of the rate made in April left unpaid; and it is contended on the part of [*161 the appellant that that rate had become payable from him by virtue of the 17 G. 2, c. 38, s. 12, which makes provision for the case of the removal of an occupier leaving rates unpaid. That section enacts, that, "where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner, and under the like penalty of distress, as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate,—which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace." The case does not so find, but we must assume that there was some arrear of the April rate left unpaid by the outgoing tenant; but the claimant has gone on in the full confidence and belief that everything due from him had been paid. Mr. *Dowdeswell* has insisted, on the part of the appellant, that there was a liability imposed upon the incoming tenant by the 17 G. 2, c. 38, s. 12, and that from the moment he entered into the occupation of the premises a proportion of that rate was payable from him by virtue of that statute: but I take the words of that enactment to mean that the party is thereby subjected to be made liable,—acquires a capacity for being made liable,—to pay a proportion of the rate; not that he incurs a primary liability which he has the means of knowing of. It is a liability which the parish officers *may if they choose enforce. It is matter of contingency whether [*162 they will put the law in force, and also matter of contingency what amount they will demand, for the outgoing tenant may have already paid the rate. Until the party has been called upon to make good the default of the outgoing tenant, and has refused or neglected so to do, I think he is not disqualified by reason of the proviso in the 27th section of the Reform Act. The words of that section are, that no person shall be registered "unless he shall have paid on or before the 20th of July all the poor-rates and assessed taxes which shall have become payable from him in respect of such premises previously to

the 6th of April then next preceding." I think the words "which shall have become payable from him" involve the idea of a definite sum payable in præsenti, which the party has been called upon to pay, and in respect of which he is in default, and not a contingency of being called upon to pay under the provision in the 17 G. 2, c. 38, s. 12. The words are, "shall have become payable from him," not "in respect of which he may become liable:" and it cannot become payable from him until the contingency of his being called upon to make good the default of the person primarily liable has been ascertained, and the amount which is claimed has been notified to him. The proviso in the 27th section of the Reform Act takes away the franchise in the event of the party making default in bearing his due share of the public burthens. The disqualifying section confirms me in this construction; because the party is disqualified from voting unless he shall have paid all the poor-rates and assessed taxes which shall have become payable from him on or before a certain day. Now, the liability to the poor-rate is entirely different from the liability in respect of assessed taxes. The latter are assessed for the
*163] year, and are *payable at certain stated times; whereas, the poor-rate is levied according to the necessities of the parish, which cannot be foreseen, and the making it may be enforced by peremptory mandamus: and, as contradistinguished from the poor-rate, it is payable the moment the rate is complete, that is, made, allowed, and published. Practically, it would be impossible for the incoming tenant to know how much of the last rate the outgoing tenant has left unpaid. It might be that the proportion to be paid by the incoming tenant was so trifling that the overseers might not think it worth while to demand it: and, if such an objection as this were allowed to prevail, a keen election agent might make the overseers' forbearance or neglect a means of disfranchising a party who has been in no default. For these reasons I am of opinion that the arrears in question did not become payable from Burrington until the persons who had authority to demand payment had settled the amount and demanded it, and so fixed him with a liability to pay a certain and ascertained debt.

WILLIAMS, J.—I have the misfortune in this case to differ in opinion from my Lord and my two learned Brothers. By the 27th section of the Reform Act the franchise for boroughs is conferred upon 10*l.* householders, subject to the fulfilment of certain conditions, one of which is that the party claiming to be retained upon the list of voters shall have paid, on or before the 20th of July, all the poor-rates and assessed taxes which shall have become payable from him in respect of the premises previously to the 6th of April then next preceding. The question before us is narrowed to this, whether this party has fulfilled that condition. It appears to me that he has not. The point turns upon the construction of the 12th section of the 17
*164] *G. 2, c. 38, which, after reciting that "persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes and places," enacts, that, "where any person or persons shall come into or occupy any house, land, tene-

ment, or hereditament, or other premises out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of His Majesty's justices of the peace." Was the proportionate amount of this rate payable by the claimant within the meaning of the proviso in the 27th section of the Reform Act? It is said that nothing can be considered to be payable from the party in respect of the April rate, because whether anything would be due from him would depend upon a variety of circumstances which remained to be ascertained, and therefore, that, until those circumstances were ascertained, no sum at all was payable from him. The 17 G. 2, c. 38, s. 12, however, says that he shall be liable to pay: and in my opinion the rate does not become the less payable from him, because the payment is not enforceable until the contingency is ascertained. I apprehend he is equally liable in the same manner as if there were no difficulty in ascertaining the amount. *It depends upon the time when [*165
the party's occupation commenced, and cannot be varied by any circumstances. It seems to me, therefore, to be impossible to say that this person has fulfilled the condition upon which his right to be registered depended, viz., that of payment of all rates payable from him in respect of the premises occupied by him. On the whole, I do not think it can be properly said that all the rates have been paid, when the sum due under the 17 G. 2, c. 38, s. 12, which the voter is by the express words of the statute liable to pay, has not been paid.

WILLES, J.—I incline to the opinion that the course taken by the revising barrister in this case was right. At least, I cannot see my way to the conclusion that he was wrong, and therefore I cannot hold that his decision should be reversed. The question, no doubt, is one of considerable nicety. It turns upon the words "which shall have become payable from him" in the 27th section of the Reform Act. No difficulty arises as to the rates made during the time the premises were occupied by Burrington. He is bound to know when a rate is made. The payment of it is made a condition precedent to his right to be on the register. He is not allowed to excuse himself on the ground of any laches on the part of the parish officers. That is quite clear. But here we have to deal with a rate which was made, allowed, and published before the claimant came into the occupation of the premises. In respect of such a rate, it is wholly unknown to the incoming tenant whether it was in arrear or not. The knowledge of that fact is confined to the parish officers. The revising barrister held that there was a distinction amounting to a difference between the two cases. It is easy enough to see the distinction: but the question is whether that should make a difference in the *construction of [*166
the Reform Act. The distinction is, that, with respect to a rate made before his occupation commenced, the party cannot be said

to be bound to take notice that such a rate has been made, or that any obligation rested upon him to pay it or any portion of it, unless you go the length of holding that he is bound to make inquiry. Whether or not he was bound to make inquiry, appears to me to be the only troublesome question in the case. I apprehend, that, when the recital and the enacting part of the 12th section of the 17 G. 2, c. 38, are looked at, it will be found that it is a section which was not intended to regulate generally the rights of outgoing and incoming tenants, but simply to give a remedy to parish officers for the recovery of rates left unpaid by tenants removing; such remedy being given against each tenant, the outgoing and the incoming tenant, for a proportionate part of the rate for the periods they may respectively have occupied. It is a special provision for the case of a tenant going out and leaving a current rate unpaid. Therefore you have at once the distinction between the liability of the party assessed and that of the person who has come lawfully into the possession of premises in respect of which he may be liable to pay something which is not primarily due from him. That is the obvious distinction between the two cases: the one is an absolute liability; the other contingent or conditional. Then there is the further distinction, that the liability created by the 17 G. 2, c. 38, s. 12, is one in respect of which the incoming tenant neither knows nor is bound to know of its existence. I cannot but think, that, in construing the Registration Act, it should be borne in mind that the register is but evidence of the right to vote, and that the liability created by the 17 G. 2, c. 38, s. 12, is a limitation or condition imposed upon that right: and therefore I do not see why we *167] should not *apply the ordinary law as to conditions to such a case. I disclaim altogether deciding this question upon the giving or taking away of the franchise. But I think a person who claims a right to vote should not have a condition enforced against him more strictly than conditions in ordinary cases are enforced. I cannot help thinking that the parish officers and the claimant are to be considered as if the former were the obligees of a bond and the latter the obligor, and the obligation was, that, if A. B. (the former tenant) has not already satisfied the amount due for the current rate, and the obligees choose to hold the obligor liable under the statute 17 G. 2, c. 38, s. 12, the latter should pay it. In that case I take it, that, according to every ordinary principle of law, notice ought to be given by the party who is to receive the money, and that the obligor would incur no forfeiture until such notice had been given. To use a familiar illustration, there could be no mora until such notice was given. In Comyns's Digest, *Condition* (L. 8), and *Pleader* (C. 73), are abundant authorities, that, in the case of ordinary conditions, notice of default must be given. This is evidently the distinction upon which the revising barrister has acted. Forming the best judgment I am able, I have therefore come to the conclusion that his decision is right, or, at all events, that I cannot see that it is wrong.

KEATING, J.—I have come to the conclusion, upon the whole, that the decision of the revising barrister in this case is right. The question undoubtedly is one of considerable nicety, viz., what is meant by the proviso in the 27th section of the Reform Act, that the claimant before he shall be entitled to be registered shall have paid all the

poor-rates, &c., which shall have become payable from him in respect of the premises. *I agree with my Lord and my Brother Willes, that, the claimant not having himself necessarily any [*168 notice of the existence of a state of things which would make the antecedent rate payable from him when he entered upon the occupation, there must be an obligation on some one who is cognisant of the fact of its payability to give him notice. Here, that obligation could only rest upon the parish officers. The 17 G. 2, c. 38, s. 12, contemplates the tenant's not only going away during the currency of a rate, but also going away leaving the rate unpaid. The reasonable construction of the 27th section of the Reform Act appears to me to be, that, there having been no demand of the rate made upon this person, or other notice to him of the existence of a state of things which would make it payable from him, the non-payment of it did not disqualify him from being upon the list of voters.

Decision affirmed.(a)

(a) The question being one which was fairly arguable, no costs were given.

Borough of KIDDERMINSTER.

RICHARD POWELL, Appellant; WILLIAM FARMER, Respondent. *Jan.* 17.

1. The tenant of land in a borough erected thereon at his own expense a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground, and used the same for storing potatoes and other things connected with his business of a market-gardener. The revising barrister having found the thing so described to be a "building" within the 27th section of the Reform Act,—Held, that there was not sufficient in the description which he had given to authorize the Court to reverse his decision.

2. And, the revising barrister having found that this building was occupied by the party "as tenant,"—the Court (acting on the general presumption that things affixed to the freehold pass to the landlord) held that they could not see sufficient on his statement to authorize them to reverse his decision.

3. The tenant had erected in like manner on the land a pig-stye, with a slated roof, but in other respects similar to the structure before mentioned:—*Semble*, that this was not a "building" within the Act.

AT a Court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of William Farmer being retained *on the list of persons entitled [*169 to vote in the election of a member for the borough of Kidderminster in respect of property occupied within the parish of Kidderminster Borough.

The said William Farmer is a market-gardener, and, for the purposes of that business, had rented and occupied under the same landlord five acres of land in the parish of Kidderminster Borough, for more than twelve calendar months next previous to the last day of July, 1864, of the clear yearly value of 20*l.*

There was no building on the land when the said William Farmer first took the same of his landlord; but, previously to the 31st of July, 1863, the said William Farmer had erected on the land, at his own expense, *a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground.* The entrance to this

structure was by a door fastened by a padlock: *and it was used by the said William Farmer for storing potatoes and other things connected with his business.* The said William Farmer had erected in like manner on the said land *a pig-stye, with a slated roof, but in other respects similar to the structure before mentioned.* The flooring of the pig-stye was cinders laid on the ground to keep it dry.

It was objected on behalf of the said Richard Powell, that the said William Farmer's name ought to be expunged from the said list, on the following grounds,—first, that the structures erected by the said William Farmer were not nor was either of them a "building," within the meaning of the Reform Act,—secondly, that, inasmuch as the structures had been erected by the tenant, they formed no part of the
*170] property for which he paid rent, and could not be said to *be occupied by him with the land as tenant under the same landlord.

The revising barrister held that the said structures were buildings within the meaning of the Act; and that they were affixed to the freehold: and he decided to retain the name of the said William Farmer on the said list.

If the Court should be of opinion that his decision was wrong, the name of the said William Farmer was to be expunged from such list.

Keane, Q. C., for the appellant.—That which Farmer relies on as constituting his qualification to be upon the register is clearly not sufficient within the 2 W. 4, c. 45, s. 27. The words of the section are, "any house, warehouse, counting-house, shop, or *other building*," occupied either separately or jointly with any land within the city or borough, &c. Land *alone* will not qualify under this section. The thing here described,—the shed,—clearly would not be such a tenement as would confer a settlement. In The King *v.* The Inhabitants of Londonthorpe, 6 T. R. 377, a pauper rented land in Grantham of the annual value of 6*l.* 10*s.* 6*d.*, and built on part of it a post windmill, at the expense of 120*l.*, which by agreement with his landlord he was to be at liberty to remove at pleasure. He let the mill for a part the time at the rent of 9*l.* per annum: and it was held that this was not the taking of a tenement of 10*l.* a year, and consequently that the pauper gained no settlement in Grantham. The "wooden structure" here was no part of that which Farmer rented. [KEATING, J.—The revising barrister finds that it was a "building," and that it was affixed to the freehold.] He describes the structure; and the Court may very well say that they do not agree that a thing so con-
*171] structed could be a building or affixed to the freehold. Things *erected for the purpose of trade are removable: Hellawell *v.* Eastwood, 6 Exch. 295.† [ERLE, C. J.—In Elwes *v.* Maw, 3 East 38, a distinction is taken between things annexed to the freehold for the purposes of trade, and those erected for the purposes of agriculture.] This structure was erected for the convenience of the party's business of a market-gardener, and was clearly removable by him. [BYLES, J.—In Watson, app., Cotton, resp., 5 C. B. 51, 2 Lutw. Reg. Cas. 53, it was held, that, where the revising barrister finds a certain erection to be a "building" within the statute, and gives a description which does not necessarily show that it cannot be a building within the Act, the Court will not interfere with his decision.] The descrip-

tion of the building there was given as follows:—"The shed stood against a wooden paling, the boundary of the wharf, but was not fastened to it. Six posts put into the ground supported a tarpaulin or tar-cloth, which formed the roof. One of the sides of the shed was boarded up with boards fastened to the posts by nails. The shed was used for purposes connected with the occupation of the wharf." In the course of the argument, Maule, J., says: "The revising barrister has found that this is a 'building,' within the meaning of the Act; and he gives us a description embracing some of the incidents of a building. He describes two sides of the structure: *the rest may be of solid masonry.*" In giving judgment, Wilde, C. J., says: "The revising barrister has found the erection in question to be a 'building' within the meaning of the Act; and his decision must stand, unless the Court is satisfied that the thing described cannot be a building. It is difficult accurately to define what is a building. The statute uses the word 'warehouse.' I do not apprehend that this could not be called a warehouse, merely because it might be open on all rides. The shed, as it *is called, appears to be closed on two sides; and to have a roof; and it is used by the respondent for purposes connected with the occupation of the wharf. It is also stated to be used by one Marks as a place of deposit for goods. When, therefore, it is said, that, to constitute a building within the Act, the thing must be ejusdem generis with those particularly enumerated, I think that this does sufficiently appear to be a 'warehouse.' At all events, there is nothing in the case that is inconsistent with its being so held. The revising barrister having found it to be a 'building' within the Act, I must assume that it has all the requisites to constitute a building, except the incidents he sets out. And I see nothing in the facts he has stated to guide the Court in the exercise of its opinion, that can prevent this being a building analogous to a warehouse." And Maule, J., added: "Its being more or less substantial cannot affect the question." Here, however, we have a full description of the thing, and of the circumstances under which it was erected: and these totally exclude the notion of its being a building or any part of that which the respondent rented. It is neither a building, nor is he tenant of it. [BYLES, J.—Suppose the respondent does not exercise his right to remove this structure?] He may in that case be assumed to have ceded it to his landlord; and the next occupier may possibly become tenant of a building. The "pig-stye" clearly cannot in any sense be said to be a building: it must be either fit for the habitation of man, or a place to be used for commercial purposes. [*172

Karslake, Q. C. (with whom was *The Hon. R. Bourke*), for the respondent.—Watson, app., Cotton, resp., is precisely in point. It is impossible for the Court to hold that a structure described as this is cannot be a building. Then, as to the character of the *occupation,—If the structure be irremovable, it cannot be said that the respondent does not occupy it as tenant. Whatever, as a general rule, is fixed to the soil becomes part of the soil. [ERLE, C. J.—The statute intended, that, to be a voter for a borough, the party should be an inhabitant, or should have some commercial interest therein. Land may be joined to the other subject of qualification in order to [*173

eke out the value: but there must be "house, warehouse, counting-house, shop, or other building," that is, something of the same character and description as those mentioned. This principle was incidentally discussed in the recent case of Cook, app., Humber, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103), K. & G. 413.] Then, a pig-stye may equally be a building within the meaning of the Act. [ERLE, C. J.—It may be that the shed used by the market-gardener for storing his potatoes may be a building used for the purposes of trade. But it seems to me that a dog-kennel would form as good a qualification for a vote as a pig-stye.]

Keane, Q. C., in reply, referred to Culling *v.* Tuffnal, Bul. N. P. 34, Wansbrough *v.* Maton, 4 Ad. & E. 884 (E. C. L. R. vol. 31), 6 N. & M. 367, The King *v.* The Inhabitants of Otley, 1 B. & Ad. 161 (E. C. L. R. vol. 20), and Martin *v* Roe, 7 Ellis & B. 237 (E. C. L. R. vol. 90).

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court:—

Upon this appeal two questions are raised,—first, whether the shed described in the case was a "building" within the statute, that is, whether it had sufficient permanence, and was ejusdem generis with the buildings specified in the statute,—house, warehouse, counting-house, shop.

*174] *The revising barrister found it to be such a building; and, according to the principle laid down in Watson, app., Cotton, resp., 5 C. B. 51 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 53, we do not see sufficient in the description he has given, to authorize us to reverse his decision. It is constructed of planks nailed to posts let into the ground, and used for storing potatoes, that being an article in the way of the claimant's trade of a market-gardener.

The second question is, whether this shed was occupied by the claimant in the capacity of tenant. As to this, the facts are, that, at the time of the demise there was no shed on the premises; but the claimant placed it there during his term, and used it as above mentioned.

The revising barrister found that it was so occupied; and we do not see sufficient on his statement to authorize us to reverse his decision.

If the shed had become the property of the landlord, it was occupied by the claimant in his capacity of tenant, although he constructed the shed and placed it there during the term: and the general rule is, "quicquid plantatur solo solo cedit." It may be that the shed continued the property of the tenant, and was subject to be removed by him at any time during the term. His right to do so might depend on his contract with his landlord, or on the nature of the structure being such as would make it removable as a trade-fixture. But, whatever may be the right of the tenant if further facts were added, upon the statement made, we act on the general presumption that things affixed to the freehold pass to the landlord, and affirm the decision.

The revising barrister has raised a further question, whether a pig-stye is a building ejusdem generis with "house, warehouse, counting-house, and shop." It is *not necessary to answer this ques-

*175] tion, which is only raised in case the shed was found insufficient: but we would add that we are by no means prepared to assent

to the revising barrister's opinion on this point, without further discussion.

We would further add that the revising barrister has in our judgment done good service in sending this and the next following case to us for our decision, and giving us the opportunity of explaining what we consider to be the true meaning of the Court in Watson, app., Cotton, resp., and thereby putting some limitation upon the wide inferences drawn therefrom,—contrary, in some degree, to the intention both of the Legislature as expressed in the statute, and of the Judges expounding the same. Decision affirmed.(a)

(a) See the next case.

Borough of KIDDERMINSTER.

RICHARD POWELL, Appellant; JOHN GEORGE BORASTON, Respondent. *Jan.* 17.

1. The respondent occupied a farm of which a few acres, worth more than 10*l.* a year, were within a borough, but with no building thereon. An electioneering agent, for the purpose of creating a vote, erected on this land a shed, made of wood, having four boarded sides and a boarded roof, and being supported by four posts let into the ground three feet.

The revising barrister having held that this was a "building" within the 27th section of the Reform Act, and that it was occupied by the respondent as "tenant,"—the Court (acting upon the rule laid down in Cook, app., Humber, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103), K. & G. 413) reversed his decision.

2. Remarks upon Watson, app., Cotton, resp., 5 C. B. 51 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 53.

AT a Court held for the revision of the lists of voters for the borough of Kidderminster, Richard Powell objected to the name of John George Boraston being *retained on the list of persons entitled to vote in the election of a member for the borough of Kidderminster in respect of property occupied in the parish of Kidderminster Foreign. [*176

The said John George Boraston is a farmer, and for several years has rented and occupied a farm at Sutton Common, within the parish of Kidderminster Foreign, but being partly within and partly beyond the limits of the parliamentary borough of Kidderminster.

The greater portion of the farm, including the farm-buildings, is beyond the borough limits; but a few acres of land, of more than the clear yearly value of 10*l.*, lie within the borough.

There was no building on the land within the borough when the said John George Boraston took the farm of his landlord: but, in the summer of 1862, a shed was placed upon the piece of land within the borough. *This shed was made entirely of wood, having four boarded sides and a boarded roof, and being supported by four posts let into the ground three feet.* It adjoins a public road; and most of the side boards of the shed facing the road have been broken to pieces. There is no floor to the shed. It is entered by a door, and *used by the tenant for keeping agricultural implements in.*

It was proved that the shed was erected by a builder of Kidderminster, in accordance with instructions received by him from an

active political agent in that borough, who had no interest either as landlord or tenant in the land upon which it was erected. But previously to its erection the permission of the said John George Boraston was asked, who replied that he could not give an answer; his landlord must be asked. There was no evidence of the landlord having given such permission: but the said John George Boraston
*177] gave *instructions to the builder as to the size of the door of the shed, and told him, that, if he required it floored, he would do it himself.

It was objected on behalf of the said Richard Powell that the name of the said John Boraston ought to be expunged from the said list, on the following grounds,—first, that the shed erected as aforesaid was not a "building," within the meaning of the Reform Act,—secondly, that under the circumstances stated respecting its erection, there was no occupation of the shed by the said John George Boraston, within the meaning of the Reform Act,—thirdly, that the shed formed no part of the property for which the said John George Boraston paid rent, and could not be said to be occupied by him with the land, as tenant, under the same landlord.

The revising barrister held the contrary of these objections, and decided to retain the name of the said John George Boraston on the said list.

If the Court should be of opinion that his decision was wrong, the name of the said John George Boraston was to be expunged from such list.

Keane, Q. C., for the appellant.—This is a stronger case than that of Powell, app., Farmer, resp., antè, p. 168. The thing described in the case cannot under any circumstances be considered as a "building" within the Act: it formed no part of the premises for which the respondent paid rent. The revising barrister was clearly wrong in holding that it could confer a qualification.

Karslake, Q. C. (with whom was *The Hon. R. Bourke*), for the respondent.—The revising barrister has found this structure to be a building. The description he gives of it is not such as to preclude the possi-
*178] bility of *its being a building. It is used by the tenant as part of his holding, for the storing of agricultural implements. The mere fact of its having been built by a stranger does not prevent it from being a "building" within the Act. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the Court:—

The respondent occupied a farm of which a few acres, worth more than 10*l.* annually, were within the borough; and on this part of the farm there was no building at the time of the demise, nor for years after. In 1862, an electioneering agent, having no interest of any sort in the land, caused a shed, made of boards nailed to posts, to be erected, and therein the respondent had kept some agricultural implements. There was no evidence that the landlord had any knowledge on the subject. The revising barrister held that this shed was a building within the statute, and that it was occupied by the respondent as tenant. His decision is the subject of this appeal: and we are of opinion that it should be reversed on both points.

The Legislature has not defined with clearness the qualification for a vote in a borough. In a county, all that is comprised under the term

land is the principal source of qualification. But, in a borough, land alone does not qualify: it can only be used as an accessory to a building for the sole purpose of making up the value of 10*l.*

The intention of the Legislature respecting a qualification for a borough was much considered in Cook, app., Humber, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103), K. & G. 413. It is there laid down, at p. 41, "that the qualification is compounded of four elements,—tenement, value, occupation, and estate. For tenement, there must be *a house, warehouse, counting-house, shop, or other building analogous thereto: there must be the annual value, 10*l.*: there must be occupation, that is, actual exercise of the rights of an owner in possession, during the requisite time: and there must be an estate in the tenement, either of fee or less. If these four distinct elements are combined in the claimant, he is qualified [in respect of property]; if otherwise, he is not. Now, although they must exist in combination, in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained,—first, is the claimant tenant?—secondly, is he occupier?—thirdly, is the tenement sufficient in value?—and, fourthly, in kind?" Again, in pp. 44 and 45, it is said: "The statute required some permanent occupation of, and some independent interest in, the property. The permanence prevents the sudden creation of votes. The ownership or the tenancy (with rating) indicate some independence,"—in other words, the requirement of at least a tenancy excludes some occupations of less independence, such as that of servants and objects of charity. "As to the kind of tenement which qualifies, the statute has described two classes of buildings, namely, those used for residential and those used for commercial purposes; that is, house for residence; warehouse, counting-house, shop, or other analogous building, for commercial purposes." [*179

To apply these principles to the present case, we think that the so-called building is not of the class specified in the statute, that is, it is neither in the residentiary class nor in the class connected with commercial industry. We also think that the claimant's occupation thereof was not in the capacity of tenant.

As to the first question,—whether the so-called building is sufficient to qualify,—we are aware of the impossibility of defining clearly what is included in *the class described in the statute by the words "or other building," and of the difficulty of affirming that a thing is not in a class, when the boundary of the class is unknown. We are also aware of the immense variety of structures which are sufficient buildings, considering the locality and the use for which they are adapted in that locality. Still, we are of opinion that the intention of the Legislature would be defeated, and the words indicating the class of buildings which qualify would be without any effect, if everything which could be called a building was held sufficient. It ought to be in some degree adapted both to be used by man either for residence or for the industry to which the statute relates, and also to have the degree of durability which is included in the idea of a building. [*180

The shed in question fulfils neither of these conditions. The boards were nailed to the posts for the purpose of performing the part of a

shed to the revising barrister, not for any purpose connected with the interest of the occupier; and was so frail as to have been destroyed in part before the required year had elapsed.

The Legislature intended that "building" should give the primary qualification; and that "land" should be a secondary resort, if the building was not worth 10*l.* per annum. But "land" would become the primary qualification, if a shed of no value added to land of the required value was held to qualify.

We are aware that the question whether a building qualifies is more a question of fact than law, to be answered by the revising barrister, performing the part of a jury in applying the law to the facts before him. We are also aware of the soundness of the principle laid down in Watson, app., Cotton, resp., 5 C. B. 51 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 53, that, if the revising barrister finds the building in question to be within the statute, the *Court will make every presumption for the purpose of supporting his finding, and will not reverse it unless the case shows it to be erroneous. We adopt these principles as sound: still, we think that this decision is shown to be erroneous.

*181]

The case of Watson, app., Cotton, resp., has been treated by some text-writers as if it had decided that a tarpaulin supported by poles, as described in the case, was a "building" within the statute: and they have drawn wide inferences therefrom; and these inferences are carried to the furthest extent in 2 Lutwyche's Reports 58. The learned reporter, in a note there, speaking of this case, thus expresses himself,—"It will not be easy in future to say what is *not* a 'building,' however slight and unsubstantial the structure may be, provided there be a roof to it." And he goes on to say, that, "if a building be *capable* of holding and protecting any articles, whether of a perishable nature or not, it may fairly be considered to be a warehouse." He further goes on to say, that, on these principles, "there seems to be no reason why a party may not be qualified to vote for a borough in respect of his occupation of a fowl-house, a donkey-shed, or a pig-stye, if the land occupied therewith will make up the required annual value."

The report of this case in 5 C. B. 51 (E. C. L. R. vol. 57), does not warrant the inference thus drawn from it. It appears there that the Judges, resolving to support the finding of the barrister, unless he states facts showing that he must have been in error, take his description to be incomplete, and assume that the description, if it had been complete, would have shown that the shed was a building in the ordinary sense of the word, and was properly included in the same class as warehouse. At p. 52 of that report, Maule, J., says: "The revising barrister gives us a description embracing some of the *incidents of a 'building.' He describes two sides of the structure: *the rest may be of solid masonry.* He does not profess to give a full description of it." Wilde, C. J., says it is possible to conceive sheds of a very substantial and valuable character: for instance, the sheds in the docks, which for the most part consist of columns of iron or stone, supporting slated roofs." Then, in his judgment, the Chief Justice says,—"The revising barrister *having found it to be a 'lding' within the Act,* we must assume that it has all the requisites

*182]

to constitute a 'building, except the incidents he sets out." And Maule, J., says: "*It is not denied that the shed in question is a 'building.*' When once it is established that the thing is a 'building,' the only question which remains, is to be decided by the uses and purposes to which the building is or may be put. If it is or may be applied to the purposes of a building such as is mentioned in the Act, it may be said to be a building within the meaning of the Act. Its being more or less substantial cannot affect the question. Nobody would for a moment doubt that a place constructed at great expense, and of great solidity, closed on two sides, and used for the stowage of goods, would be a building within the Act. Assume this to be a building, and in what does that differ from this?"

It thus appears to us that the Judges do not hold that the shed *as described* is a "building" within the Act; but they declare it to be their duty to assume any possible facts not excluded by the case, for the purpose of affirming the barrister's finding. The barrister finds it to be a building; that finding is to stand, unless the case excludes the possibility of its being a building; and the Judges say, that, consistently with the case, the shed may have been on two sides of solid masonry, and may have been of a very substantial and valuable character, and may have been used for the stowage of goods.

*We may remark that it would have been better if the case had been sent back for re-statement, as Mr. *Gray* requested. The argument of that learned counsel, on behalf of the appellant, seems to have been considered by the Court as perfectly sound in law; but it did not prevail, because the facts were assumed to exist which made it irrelevant. Mr. *Gray* contended that the building must be something substantial, something ejusdem generis with those specifically mentioned, and not a mere temporary erection for the more convenient use of the land, that could be removable by the tenant: and none of the Judges disputed the correctness of this view of the law. [*183

In deciding whether or not a building is within the Act, the revising barrister is bound to give effect to the intention of the Legislature as expressed in the statute; and, in so doing, to be assisted by any rule of construction laid down in any of the cases relating thereto. But his attention should never be turned from the statute which he has to apply: and, though general principles of construction laid down by the Judges may help to guide his decision, the specific facts of one case form a very fallacious guide in the decision on other specific facts supposed to resemble them. The specific facts of the case of the tarpaulin on poles seem to have led to unsound conclusions.

In the present case, we consider that the description of the shed is complete; that, according to that description, it was not of a substantial character, nor ejusdem generis with the buildings specifically mentioned, that is, it was neither adapted to nor intended for any purpose analogous to the purposes for which warehouses are used; and that therefore the decision holding the shed to be a "building" within the Act, must be reversed.

Secondly,—if the shed is taken to be a "building" *within the statute, then the question is raised, whether it was occupied [*184

by the respondent in his capacity of tenant: and the answer is in the negative.

It is clear that the shed formed no part of the premises demised at the time of the demise: and, although it might become parcel of the freehold by being annexed thereto, under certain conditions, and so become parcel of the demised premises during the currency of the term, the case does not show that it was made under such conditions as would vest the property in the landlord, subject to the interest of the tenant during the term. It is an encumbrance brought on the land by the license of the tenant, and, for aught that appears, subject to be removed at the will of the encumbrancer, or on the revocation of the license by the tenant.

The building,—not the land,—is the substance of the qualification. The respondent cannot hold the shed as tenant, unless the landlord has the property in it as reversioner. But the landlord is not shown to have assented to its being brought: neither is there any ground for affirming that he could object to its removal: nor does it appear that either landlord or tenant has the property in the boards, if the maker of the shed carried it away. Decision reversed.(a)

(a) See the preceding case.

---

*185] *YORKSHIRE.—West Riding.

JOHN FREEMAN, Appellant; ROBERT JOHN GAINSFORD, Respondent. *Jan.* 17.

The proprietors of a Music Hall, possessed of real estate, by deed vested the same in trustees, who were to deal with and manage it for the general body of shareholders, who were to have an interest in the net profits in proportion to the amount of their respective shares:—Held, upon the authority of Bennet, app., Blain, resp., 15 C. B. N. S. 518, that such shareholders had not any equitable interest in the realty, so as to entitle them to be registered for the county.

1. AT a Court held to revise the lists of voters for the West Riding of the county of York, Thomas Hadfield objected to Charles Stanley as not having been entitled on the last day of July, 1864, to have his name retained in the list of voters for the township of Sheffield, in and for the West Riding. The name stood on the copy of the register relating to the township of Sheffield, as follows:—

Christian and surname.	Place of abode.	Nature of qualification.	Place in township.
Charles Stanley.	31, Throgmorton Street, London.	Freehold shares.	Music Hall, Surrey Street.

2. By a deed made on the 2d of October, 1828, certain persons became entitled to undivided freehold shares in the Sheffield Music Hall, and claimed to be on the register of voters; and it was admitted that the provisions of that deed were such as to qualify them to be there.

3. A subsequent deed dated the 13th of June, 1864, was prepared, a copy of which was appended to and to be taken as part of the case.(*a*)

(*a*) The indenture of the 13th of June, 1864, was made between the several persons whose names and seals were subscribed and affixed in the schedule thereto of the first part, and William Bradley and eleven others of the second part. It recited, that, by an indenture of the 2d of October, 1828, made between James Smith, Pearson, and Hounsfield of the first part, Offley Shore of the second part, and Wilkinson and seventy-eight other persons, including the above-named James Smith, Pearson, Hounsfield, and Shore (being the several proprietors of the hereditaments and premises thereinafter described), of the third part,—after reciting that the said Smith, Pearson, and Hounsfield were seised of the fee simple and inheritance of the premises thereinafter described and conveyed, in trust for themselves and the other of the several proprietors thereof; and reciting that the said several proprietors were desirous that the said premises should be conveyed to the said Offley Shore, his heirs and assigns, in trust for himself and the other of the said several proprietors thereof according to his and their respective shares therein, as thereinafter mentioned; and reciting that the said Smith, Pearson, and Hounsfield, in order to effect the desire of the said several proprietors of the said premises, had agreed to convey the same in manner thereinafter contained—It was witnessed, that, in pursuance of the said agreement, the said Smith, Pearson, and Hounsfield (by the direction of the said several proprietors) did grant and release unto the said Offley Shore, and to his heirs and assigns, all that piece of land situate in or near a street in Sheffield aforesaid, called Surrey Street, bounded, &c., and containing in the whole twelve hundred superficial square yards, or thereabouts, Together with the building then lately erected upon the said piece of land, and called "The Sheffield Music Hall," Together with the appurtenances, To hold the same unto and to the use of the said Offley Shore, his heirs and assigns, in trust for himself and the other of the said several proprietors thereof, according to his and their respective shares therein, as thereinafter mentioned, that was to say, as to ten undivided 184th shares (the whole into 184 shares being considered as divided) in the premises, in trust for Wilkinson, his heirs and assigns for ever [and so on as to the shares of all the other parties of the third part.]

The deed in recital then contained a power to Offley Shore, his heirs, executors, administrators, or assigns, to borrow any sum not exceeding 3000*l.* on the security of the premises: and,—after reciting an indenture of mortgage (for 2500*l.*) of the 28th of August, 1853; that, by indenture of the 26th of April, 1862, the mortgage was assigned to Marcus Smith and J. H. Barber, subject to the equity of redemption; that the principal sum and the current half-year's interest still remained due to Marcus Smith and J. H. Barber; that the several persons parties to those presents of the first part were shareholders in the premises comprised in the thereinbefore recited indenture of the 2d of October, 1828, and severally held the number of shares specified opposite to their respective signatures thereto; that the said proprietors and all other persons who were or should thereafter become entitled to any share in the premises were thereinafter referred to by the designation of "The proprietors;" and that the parties thereto of the first part lately agreed amongst themselves that the said piece of land, music-hall, hereditaments, and premises, and their several shares therein, should be settled upon the trusts and in manner thereinafter appearing, and that such of them as were made parties thereto of the second part should be trustees of those presents, and such parties thereto of the second part, and the survivors and survivor of them, and other the trustees or trustee for the time being of those presents, were thereinafter referred to by the designation of "the trustees,"—It was witnessed, that, in consideration of the premises, the parties thereto of the first part did for themselves, their heirs, executors, administrators, and assigns, mutually and reciprocally agree each of them with the other and others of them, his, her, and their heirs, executors, administrators, and assigns, and such of them as were not parties thereto of the second part, did for themselves, their heirs, executors, administrators, and assigns, jointly, and each of them did for himself and herself, his and her heirs, executors, administrators, and assigns, severally agree with the parties thereto of the second part, their heirs, executors, administrators, and assigns, that all that piece of land, music-hall, buildings, and hereditaments comprised in and assured by the said indenture of the 2d of October, 1828, or mentioned or intended so to be, together with all the rights, members, and appurtenances thereto, and all the shares, estates, and, interests of the said parties thereto of the first part and of each of them therein, and also any hereditaments and premises thereafter acquired by the trustees,—all which hereditaments and premises were thereinafter referred to by the designation of "The Sheffield Music Hall," should be governed by the rules thereinafter appearing and numbered 1 to 33 (inclusively), that is to say:—

1. *Trustees.*]—The parties hereto of the second part, their heirs, assigns, and successors in office, shall be trustees of the Sheffield Music Hall, and shall have the several powers hereinafter appearing, and distinguished by the letters A., B., C., D., E., F., G., H., I., J., K., and L.:

*186] *4. It was agreed that the income received by the claimant and by each of the other four claimants after mentioned was in annual amount sufficient to qualify, if the Court should be of opinion that he and they were in other respects duly qualified and

(A.) *Fee simple vested in trustees.*]—To vest or cause to be vested the fee simple and inheritance of the Sheffield Music Hall in themselves or any of their body for the time being, or in such person or persons as the trustees shall think proper:

(B.) *Their duties.*]—To give directions to the said Offley Shore, his heirs and assigns, or other the person or persons for the time being entitled to the fee simple and inheritance of the said Sheffield Music Hall, and to the said Marcus Smith and J. H. Barber, their executors, administrators, and assigns, or other the person or persons for the time being entitled to the term of years mentioned in the said indenture of the 26th of August, 1853, with regard to any lease, mortgage, sale, agreement, deed, conveyance, or assurance, action, suit, or other proceeding, matter, or thing which the trustees may think it proper that the person or persons receiving such directions should make, bring, do, or concur in:

(C.) To grant or cause to be granted any lease, or create any tenancy for any period not exceeding a tenancy from year to year, and subject to any provision:

(D.) With such consent as is mentioned in rule 7, to grant or cause to be granted any lease or create any tenancy for any period exceeding a tenancy from year to year:

(E.) With such consent as aforesaid, to enlarge or alter the existing buildings, and to acquire any additional land, buildings, easements, or rights:

(F.) To pay off, transfer, or otherwise deal with any mortgage for the time being existing, or to make or cause to be made any new mortgage, either in fee, or for any term of years, or otherwise, for any sum or sums not exceeding the amount of such existing mortgage:

(G.) With such consent as aforesaid, to make or cause to be made any new mortgage, either in fee or for any term of years, or otherwise, for any money not exceeding 2500*l.* or other existing principal mortgage-money:

(H.) With such consent as aforesaid, to sell:

(I.) To execute and cause to be executed such agreements, mortgages, conveyances, deeds, and assurances, as they shall think proper, and to receive or direct the payment or receipt of any money; and generally to do all acts necessary for effectually exercising the foregoing powers or any of them, and especially to confer on any mortgagee or mortgagees any powers of sale or lease or other powers; and, upon any sale, to make any reservations, especially with regard to minerals or easements:

(J.) *Generally, in all matters not hereinbefore specified, to deal with and manage the Sheffield Music Hall as if the trustees were the absolute beneficial owners thereof:*

(K.) To receive the rents and annual profits, and all income and capital moneys arising from the "Sheffield Music Hall," or the exercise of the powers aforesaid:

(L.) To make from time to time by-laws for regulating their proceedings as amongst themselves, and especially to name a quorum for meetings of their own body:

2. *Majority.*]—The powers hereinbefore given to the trustees, as also all powers and authorities hereinafter given to them, may be exercised by a majority of their body for the time being; to the intent that in all respects the acts of such majority shall be effectual as the acts of the whole body:

3. *Ratification.*]—Whenever by these presents anything is required or authorized to be done by the trustees, any subsequent order for or in conformation of any such thing done without previous order shall be as effectual as a previous order:

4. In confirmation and extension, but by no means in curtailment, of the powers and privileges arising expressly under the wording of these presents, the trustees shall be entitled to all powers and privileges incident to their office, especially under the provisions of the statutes 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 145.

5. *Interest of shareholders.*]—*Out of the rents and annual profits and money in the nature of income, and not capital, the trustees shall annually, or oftener if they think proper, declare a dividend; and such dividend shall be divided amongst the proprietors according to their respective shares in the Sheffield Music Hall. The trustees may from time to time set aside such money if any as they shall think proper as a reserved fund to meet contingencies and in aid of future dividends; and such reserved fund shall rank as capital until it is otherwise appropriated. The reserved fund shall never, however, exceed 500l.: it may be invested by the trustees upon any securities allowed by law for trust-money, or upon mortgage of freehold, copyhold, or leasehold hereditaments, or upon the mortgages or debentures or preferential stocks or shares of any municipal or other corporation or company incorporated by special Act of Parliament, and the income therefrom shall rank as income from the Sheffield Music Hall.*

6. *All capital moneys from time to time in the hands of the trustees, and not otherwise applicable*

entitled to remain *upon the register. This deed was previous to the 31st of July last executed by but thirty-two of the proprietors of shares in the Music Hall; they being proprietors of one hundred and ten out of the whole one hundred and eighty-four shares. [*187

under the provisions of these presents, shall belong to the proprietors according to their respective shares in the Sheffield Music Hall, and shall be accordingly divided amongst them as early as may be after the receipt thereof.

7. *Consent of proprietors to certain acts.*]—The several powers hereinbefore given to the trustees, and respectively distinguished by the letters D., F., G., and H., shall be exercised by the trustees with the consent of the proprietors, testified by the resolution of a special general meeting of them, or by writing under the hands of such number of proprietors as shall represent two-thirds of the shares.

8. *Receipts of trustees.*]—The said Offley Shore, his heirs and assigns, shall not, nor shall the said Marcus Smith and J. H. Barber, their heirs, executors, administrators, or assigns, nor shall any lessee, mortgagee, purchaser, or other person, be bound to inquire whether such consent as aforesaid has been obtained by the trustees, whose directions and receipts shall in all cases be as effectual as if they were absolute beneficial owners.

9. *Chairman, secretary, manager.*]—The trustees shall from time to time in writing appoint one of their body to be chairman, and one other of their body, or any other person, to be their secretary; and they may from time to time appoint one of their body or any other person to be their manager; and they shall also have power from time to time to remove the persons so appointed, and to supply vacancies in the offices aforesaid respectively arising from death, resignation, or otherwise. The secretary and manager shall respectively have such powers as the trustees from time to time confer upon them.

10. *Chairman to preside.*]—The chairman, if present, shall preside at all meetings of the trustees or proprietors; but, in case of his absence, the trustees or proprietors, as the case may require, present at such meeting, shall choose one of their number to preside, and the person so chosen shall be called vice-chairman; and the chairman may subsequently sign any resolution passed by a meeting presided over by a vice-chairman.

11. *Register and minute-books.*]—The secretary shall keep two books, one of which shall be called "the register," and shall contain a record of the names, additions, and residences of the proprietors, and of all future transfers of shares; and the other of such books shall be called "the minute-book," and shall contain a minute of the meetings of the trustees and proprietors respectively, and of the resolutions passed at such meetings, and of any other business matters relating to the Sheffield Music Hall which the trustees may think proper to record: and every entry appearing in such books respectively, to be signed by the chairman and secretary for the time being, shall be conclusive evidence of all matters so entered.

12. *Share certificates to be given to proprietors.*]—Every proprietor shall (after giving evidence satisfactory to the trustees of his proprietorship, and delivering to them such title-deeds as they shall require, it being intended that all the proprietors' title-deeds shall be deposited with the trustees whenever that can be done without causing what the trustees shall consider unreasonable inconvenience), be entitled to a certificate or certificates under the hands of the chairman and secretary specifying the share or shares held by such proprietor, and to a renewal of each certificate on satisfactory evidence of the loss of the original.

13. *Transfers.*]—Every transfer inter vivos of a share or shares shall be in the form following, or in such other form as the trustees for the time being shall approve, and shall be signed by the transferror and transferree, and shall, on delivery to the secretary, and payment of 2*s.* 6*d.* per transfer, be recorded in the said register. Until the transfer is so delivered and recorded, the transferror shall be deemed to remain the holder of the share or shares comprised therein. Every such transfer shall be retained by the trustees: but the transferree shall be entitled to a transfer certificate under the hands of the chairman and secretary; such transfer certificate to be endorsed on the original share certificate, or given in such other manner as the trustees shall direct.

Form of Transfer.

"I ———— of ———— being the proprietor of the share No. —— in the Sheffield Music Hall, in consideration of the sum of £———— sterling paid to me by ———— of ————, do hereby grant the same share to the said ————, his heirs and assigns, subject to the provisions of the association deed dated the 13th day of June, 1864, and to any rules in force in pursuance of such deed. And I the said ———— do hereby accept the said share, subject to such provisions and rules. As witness our hands and seals this —— day of ——."

14. *Fractional parts.*]—No proprietor shall be entitled to sell or transfer any fractional part of a share.

*188] There were *twenty-five other proprietors by whom it was not then executed, by some small number of whom it has since been executed. The present claimant and the four other claimants after named had, however, all executed this deed previous to the 31st of July last, as also had all the new trustees.

15. *Trusts to be disregarded.*]—The proprietors as a body shall not, nor shall the trustees, be affected by any trust, whether express, implied, or constructive, to which any of the shares may be subject: and the receipt of the person in whose name any share shall stand in the register book, or, if such share stands in the names of more persons than one, the receipt of any one of such persons, shall from time to time be a sufficient discharge for all dividends and other money payable in respect of such share; and that notwithstanding any trust to which such share may be subject, and whether the proprietors as a body or the trustees may or may not have notice of such trust: and the proprietors as a body shall not nor shall the trustees be bound to see to the application of the money upon such receipt.

16. *Transfer by death or bankruptcy, &c.*]—Any person or persons becoming entitled to a share or shares in consequence of the death, bankruptcy, or insolvency of any proprietor, or in any way other than by transfer under Clause 13, shall be recorded in the register as a proprietor or proprietors upon such evidence being produced as shall from time to time be required by the trustees, and upon payment of 2*s.* 6*d.* per share transfer-fee.

17. *General meetings.*]—A general meeting of the proprietors shall be held on the first Monday in February in every year, at 12 o'clock at noon, at the Music Hall. The trustees shall lay before such meeting a statement made up on the 31st day of December then last, of the income and expenditure of the proprietors from the foot of the last statement, or, in the case of the first statement, from the 31st day of March, 1864; and such statement shall be accompanied by a report whenever the directors think there is any matter of special interest or importance calling for such report. At such general meeting, any then-existing vacancies in the trusteeship may be supplied; and one or two of the trustees, or one or two other persons, whether proprietors or not, may be appointed auditors of the accounts for the then current year.

18. *Special meetings.*]—The trustees may, whenever they think fit, and they shall upon a written requisition signed by twelve or more proprietors, convene a special general meeting of the proprietors. Every such requisition shall express the object of the meeting, and shall be delivered to the chairman or secretary or sent by post addressed "To the trustees of the Music Hall, Sheffield." Upon receipt of such requisition, the trustees shall forthwith convene a meeting of the proprietors. If they do not convene such meeting within twenty-one days from the delivery or posting of the requisition, the requisitionists or any six of them may themselves convene a meeting of the proprietors, to be held within sixty days from the delivery or posting of the requisition.

19. *Notice of special meetings.*]—Seven clear days' notice, at the least, specifying the place, day, hour, and purpose of every special general meeting, shall be given by advertisement inserted twice in some Sheffield newspapers, or by circulars sent by post to the proprietors.

20. *Votes.*]—Every proprietor shall have one vote for every share that he holds. Votes may be given personally or by proxy. Every proxy shall be appointed by writing under the hand of the appointor, or, if such appointor be a corporation, under their common seal. The proxy shall be a proprietor, and the instrument appointing him shall be left for the trustees with their secretary, or sent by post to them, not less than forty-eight hours before the time fixed for holding the meeting.

21. *Joint proprietors' receipts and votes.*]—When several persons are joint proprietors of any share or shares, any one of such persons may give effectual receipts for any money payable in respect of such share or shares, and may vote at any meeting in respect thereof as if he were the sole proprietor thereof: but, if more than one of such joint proprietors shall be present personally or by proxy at any such meeting, then that one of the persons so present whose name shall in the register of proprietors precede the name or names of the other or others of such joint proprietors present as aforesaid, shall alone be entitled to vote in respect of the same share or shares.

22. *Closing of register.*]—No proprietor shall be entitled to vote at any meeting, unless his name shall appear in the register as a proprietor. And the register shall be closed seven days before each meeting.

23. *Lunatics.*]—If any proprietor be a lunatic, or of unsound mind, such proprietor may vote by his committee; and every such vote may be given either in person or by proxy.

24. *Rules may be altered.*]—The rules for the time being subsisting may be altered either by the resolution of a special meeting of proprietors, or by writing under the hands of such number of proprietors as shall represent two-thirds of the shares.

25. *Majority to bind.*]—Any resolution carried by a majority of the votes of the proprietors

*5. It was contended for the claimant that the second deed of the 13th of June last had not yet come into operation, so as [*189 to constitute a new body of trustees; and, inasmuch as twenty-five proprietors, representing 74-184th shares, had not yet executed the deed, that, *until the whole had signed, no trustees thereunder [*190 were effectually appointed, and the rights of those who had not were not affected by its provisions. It was also urged that the deed could not operate in any way until it had been executed by all

present at a meeting of proprietors shall be binding. In case of an equality of votes, the chairman of the meeting shall have a casting vote, in addition to his vote as a proprietor: and a declaration by such chairman that a resolution has been carried or negatived shall be sufficient evidence of the fact, unless a poll be demanded by three proprietors. If such poll be demanded, the same shall be taken in such manner as the chairman of the meeting shall direct: and the result of the poll, certified under the hand of such chairman, shall be conclusive as the resolution of the meeting.

26. *Notices.*]—All notices shall be in writing, or in print, or partly in writing and partly in print: and all notices to the proprietors shall, with respect to any share or shares to which such persons are jointly entitled, be given to whichever of the said persons is named first in the register; and notice so given shall be sufficient notice to all the proprietors of such share or shares.

27. *Errors.*]—All acts done by any meeting of proprietors, or by the trustees, or any person or persons acting as a trustee or trustees, shall, notwithstanding it may be afterwards discovered that there was some defect in the calling of or proceedings at such meeting, or in the appointment or qualification of such trustees or any of them, or persons or person acting as such trustees or trustee, be as valid as if no such defect had existed.

28. *Retirement of trustees.*]—Any trustee may retire from office by giving notice in writing of such his desire; such notice to be directed "To the trustees of the Sheffield Music Hall," and to be left for them with the chairman or secretary, or sent through the general post office directed "To the secretary of the Music Hall Trustees, Sheffield." Whenever a trustee shall cease to be a proprietor, he shall then ipso facto cease to be a trustee.

29. *New trustees.*]—When by death or otherwise the trustees shall be reduced to three in number, a special meeting of the proprietors shall be convened; and at that meeting such a number of new trustees shall be elected as the meeting shall think proper, but so, however, that the total number of trustees shall not exceed twelve.

30. *Trustees not disqualified from having shares.*]—Every trustee may purchase or acquire shares in all respects as if he were not a trustee, any rule of law or equity to the contrary, notwithstanding.

31. *Interpretation.*]—Whenever, in any of the foregoing or following rules, words or expressions are used importing the singular number only, or the plural number only, or males only, such words or expressions shall be construed to include several persons as well as one person, and the converse, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or contract repugnant to such construction.

32. *Parties executing bound, though all proprietors do not sign.*]—*If all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same; and the same proportion of majorities of the parties who do so execute shall bind the whole of them, as are hereinbefore appointed to bind the whole body of proprietors.*

33. *Arbitration clause.*]—Whenever any dispute shall arise between any proprietors or other persons for the time being affected by the rules in force concerning the Sheffield Music Hall, the question in dispute or difference shall be referred to two arbitrators, one to be appointed by each party, or an umpire to be appointed by the two arbitrators before they proceed with the reference; and the decision of the said arbitrators or umpire, as the case may be, shall be final and bind the contending parties, and settle the liability to defray all the expenses attending such reference: and such award may at the instance of any party interested therein be made a rule of one of Her Majesty's Courts at Westminster: and, if either party in difference shall neglect to appoint an arbitrator for twenty-one days after the appointment notified to such party of an arbitrator by the other party, then an arbitrator appointed by the arbitrator so chosen shall be as competent to act in all respects as if he had been chosen by the necessary party.

*191] the shareholders: *and that the only deed before the Court was the original deed of 1828.

6. It was also argued, on behalf of the claimants, that, even if the effect of the deed of the 13th of June was, to create a body of trustees *192] for the purposes *therein named, such creation would not destroy the equitable freehold interests of the claimant and his co-proprietors in the Music Hall.

7. For the respondent it was argued, that, the proprietors being *193] resident in various distant places, and *inasmuch as it would in all probability be long before the deed of 1864 could be executed by all of them, clause 32 of that deed was inserted for the very purpose of making the deed valid and effectual as to the shares *194] of those who from time to time executed it, *even although not executed by all the proprietors, but that all the present claimants had executed the deed of 1864, and their shares were therefore liable to the operation of it: that each proprietor of an undivided *195] 184th share was competent to execute a deed *declaring trusts respecting his share, and that, on the execution of such deed, his share would be liable to such trusts; that what one could do without the concurrence of all, any intermediate number of proprietors *196] could do without the concurrence of all, and bind their *own shares as effectually as all the shares would be bound by the execution of all; and that, in this instance, a majority of the shareholders holding a majority of the shares, and all the new trustees, had executed the deed of 1864, and they had therefore practically the power and control in their hands.

*197] *8. Under these circumstances, the revising barrister was of opinion that the claimant ought not to have been on the register, and expunged his vote. If the Court should be of opinion that the said Charles Stanley and the other four claimants were not *198] disqualified *under the provisions of the said deed of the 13th of June, 1864, the register was to be amended by the insertion of the names of the said Charles Stanley and the other four claimants; but, if the Court should be of opinion that they were disqualified by that deed, then the register was to remain as amended by the revising barrister.

9. The cases of the other four claimants were consolidated with the principal case.

Cleasby, Q. C., for the appellant.—The main question is, whether this case is governed by the decision in Bennett, app., Blain, resp., 15 C. B. N. S. 518 (E. C. L. R. vol. 109), 1 Hopw. & Ph. 35, where this Court held that the members of a Company provisionally registered under the 7 & 8 Vict. c 110, s. 58, established for the erection of a corn exchange at Manchester, under a deed of settlement which gave them only a right to a share of profits,—the real estate of the Company being vested in trustees, and the management in a committee,—had no such equitable interest in land as to entitle them to be registered. It is submitted that it is not, inasmuch as the whole scope of the deed here shows that the claimant has an interest in land. It appears that the Sheffield Music Hall was by a deed of the 2d of October, 1820, vested in certain persons in undivided shares, in fee. Under this deed, it was conceded that each shareholder was entitled to be registered.

The question is, whether the subsequent deed of June 13th, *1864, deprives them of that right. On the part of the appellant, it is submitted that the deed was not intended to alter the equitable rights of the parties, but merely to vary the mode of management of the Hall. After reciting the interest which the parties of the first part,—the shareholders,—had in the premises, and that they had agreed amongst themselves that "the said piece of land, Music Hall, hereditaments, and premises," should be settled upon the trusts thereinafter appearing, the deed witnesses, that, in consideration of the premises, "the parties thereto of the first part did, for themselves, their heirs, &c., mutually and reciprocally agree each of them with the other and others of them, his and their heirs, &c., and such of them as were not parties thereto of the second part did for themselves, &c., severally agree with the parties thereto of the second part (the trustees), their heirs, &c., that all that piece of land, Music Hall, buildings, and hereditaments comprised in and assured by the said indenture of the 2d of October, 1828, or mentioned or intended so to be, together with all the rights, members, and appurtenances thereto, and all the shares, estates, and interests of the said parties thereto of the first part and each of them therein, and also any hereditaments and premises thereafter acquired by the trustees should be,"—not conveyed, assigned, and assured to the said trustees, but,—"governed by the rules thereinafter appearing,"—one of which is, that the fee-simple and inheritance of the Sheffield Music Hall should be vested in themselves or any of their body for the time being, or in such person or persons as they should think proper; another, that they should receive the rents and profits, and divide the same amongst the shareholders; and another, that they should generally deal with and manage the Sheffield Music Hall as if they were the absolute beneficial owners thereof. *[WILLIAMS, J.—The trustees are to receive and divide the net proceeds. Would not the principle of Myers *v.* Perigal, 11 C. B. 90 (E. C. L. R. vol. 73), 16 Simons 533, 2 De Gex, McN. & G. 599, apply, viz., that the shareholders took only an interest in a share of the profits?] Each shareholder, it is submitted, still continues the equitable proprietor of a share in the Music Hall,—an interest in the realty. The question is, whether there is a trust in the land, or only in the result,—the profits. The only object of the deed of the 13th of June, 1864, was, to regulate the future management of the concern, for the benefit of the shareholders. There is nothing, therefore, to bring the case within the rule laid down in Bennett, app., Blain, resp.. The Court there properly held the shares to be personal estate. The deed expressly declared that they should be so treated. Further, it admits of considerable argument whether the deed of the 13th of June, 1864, could have any operation at all until signed by all the shareholders. But for Rule 32, which provides, that, "if all the proprietors of shares in the Sheffield Music Hall shall not execute these presents, the same shall nevertheless bind all the parties who do execute the same," this objection would have been unanswerable. That clause, however, may well operate to bind those who have executed the deed so far as regards the management of the property, without operating to convey the property until all the shareholders had executed it.

[*199

[*200

Hannen, for the respondent.—We begin with this, that the legal estate in these premises was originally vested in a trustee, who had power to raise a sum of money by mortgage, and who has exercised that power. In order to ascertain what interest the cestuis que trust have, we must look at what they have agreed to. They have agreed amongst themselves that the property shall remain vested in trustees, *201] and the *income be applied in a particular manner. The operative part of the deed is that which declares that the land, Music Hall, &c., "shall be governed by the rules hereinafter appearing." These rules show that the property, and the sole control and management thereof, were vested in the trustees, and that all the interest the shareholders have or can have, is, a participation in the net profits according to the amount of their respective shares. The decision of the revising barrister proceeded on the ground that the present case falls within the principle of Bennett, app., Blain, resp. It is impossible to distinguish the two cases. The rules there correspond as nearly as may be with those in the present case, except that there the general body of proprietors had a much greater control over the receipts than here. The dividends were to be declared by a general annual meeting. In the argument of that case, Bligh *v.* Brent, 3 Y. & C. 268, Watson *v.* Spratley, 10 Exch. 222,† Myers *v.* Perigal, 11 C. B. 90 (E. C. L. R. vol. 73), 16 Simons 533, 2 De Gex, M'N. & G. 599, and Baxter, app., Brown (or Newman), resp., 7 M. & G. 198 (E. C. L. R. vol. 49), 8 Scott N. R. 1019, 1 Lutw. Reg. Cas. 287, were cited: and Williams, J., in giving judgment, says: "This case must be governed by the principle which has been established in the several cases which have been referred to in the course of the argument, and especially in the case of Edwards *v.* Hall, 6 De Gex, M'N. & G. 74, where it was held by Lord Cranworth, upon a careful review of all the authorities, that shares in joint-stock companies,—canal, waterworks, and gas-light companies,—are not an estate or interest in land, within the meaning of the Statute of Mortmain [9 G. 2, c. 36], whether the Act of Parliament incorporating the company does or does not contain a clause declaring the shares to be personal estate. That principle *202] has, in Myers *v.* Perigal, been solemnly *decided to apply equally to a company not incorporated by Act of Parliament. The principle established by these cases is this, that a shareholder in a company of this description has no direct interest in or right to any specific portion of the property of the company, but only a right to receive a share of the profits. Applying that principle to the present case, it seems to me, that, according to the terms of the deed of settlement which governs the affairs of this company, the income of the real estate in respect of which the franchise is claimed, is to be taken by the committee appointed to conduct the business of the company: and they, having received the income, and made the necessary disbursements for carrying on the concern, are to pay over the balance to and amongst the shareholders. What each shareholder is entitled to, therefore, is, not any particular income arising from the land held by the trustees. Neither in law nor in equity is he so entitled. All he is entitled to is a proportionate share of the profits. According, therefore, to the principle which led the Courts in those cases to hold that shares in the companies which came under consider-

ation before them did not constitute an interest in land, I am of opinion that the shareholders in this case have no such interest, legal or equitable, in this land, or in the income arising from it, as to confer upon them the franchise." It is impossible to have a statement of the principle of law more closely applicable to this case. The other point is founded upon a fallacy. It is assumed that the deed is to have no operation at all until the whole of the shareholders or proprietors have executed it. The 32d rule shows that that is not so.

Cleasby, in reply.—Baron Martin's judgment in Watson *v.* Spratley is strongly in favour of the appellant. *The matter was much considered in Baxter, app., Brown (or Newman), resp., which [*203 was the case of a partnership in a mill, the property being vested in one partner as trustee for the others, with powers of management very similar to those contained in this deed: and the Court held that each partner had an interest in the realty corresponding with the amount of shares held by him in the partnership. [KEATING, J.—Lord St. Leonards did not quite agree with the decision of this court in that case: see Myers *v.* Perigal, 2 De Gex, M'N. & G. 599.] Tindal, C. J., puts the right of the claimants in that case to vote upon this ground,—"that the property of which the trustees are seised in trust for the benefit of the shareholders who form the copartnership, is freehold land; that the copartners by their committee are in possession thereof; that the trusts declared by the deed are no more than agreements and regulations entered into between the copartners for the better carrying on their joint trade by the means of such land and the mill erected thereon, and are not trusts inconsistent with an equitable seisin of the freehold in the copartners." And, in the course of the argument, Cresswell, J., puts the test,—are they trustees of the land itself? The rules here are merely rules for the management of the concern amongst the parties themselves, and afford no legitimate argument against the appellant. He had confessedly an interest in the land at starting; and he has never parted with that interest. It is not like the case of an ordinary joint-stock company.

ERLE, C. J.—I am of opinion that the decision of the revising barrister in this case should be affirmed. Looking at the provisions in this deed and at those of the deed in the case of Bennett, app., Blain, resp., it appears to me that the two deeds are substantially the *same, and vest substantially the same interest in the share- [*204 holders in the respective speculations, viz., an interest in the profits which result from the management of the trustees. I take the principle laid down by my Brother Williams in Bennett, app., Blain, resp., to be sound law, and to be decisive of this case. He lays it down, that, under deeds of this description, the shareholders have no direct interest, either legal or equitable, in the *land*, but only a right to participate in *the profits* of the concern. The circumstance of the deed not having been executed by the whole of the shareholders is not available for the purposes of the appellant; for, the 32d rule provides that, "if all the proprietors of shares in the Sheffield Music Hall should not execute these presents, the same shall nevertheless bind all the parties who do execute the same." I think that provision precludes the appellant from taking any benefit from that point.

WILLIAMS, J.—I concur with my Lord in thinking that we are

bound by the case of Bennett, app., Blain, resp. The principle on which that decision proceeded is precisely applicable to the present case, viz., that the trusts on which the equitable claim in question is founded, give the shareholders no direct right to any portion of the receipts of the Music Hall, but only to a proportionate share of the net profits. It is upon that principle that a long series of cases on the Mortmain Act was based. I think it is impossible to distinguish this case from Bennett, app., Blain, resp.

WILLES, J.—I am entirely of the same opinion: and I give my judgment in the language of my Brother Williams in Bennett, app., Blain, resp.,—"A shareholder in a company of this description has no
*205] direct interest in or right to any specific portion of the *property of the company, but only a right to receive a share of the profits."

KEATING, J.—I am of the same opinion. I can see nothing in the deed regulating the affairs of the Sheffield Music Hall, to distinguish this case in principle from that of Bennett, app., Blain, resp.

Decision affirmed, without costs.

Borough of NEW WINDSOR.

THOMAS SCOTT, Appellant; BENJAMIN C. DURANT, Respondent. *Jan.* 17.

The Court cannot entertain an appeal against a decision of a revising barrister unless the requirements of the 42d section of the 6 & 7 Vict. c. 18 have been duly complied with, or there be a clear and unequivocal consent to waive the performance of them.

THIS case having been set down in the list of appeals for argument in Michaelmas Term last,

J. O. Griffits, on behalf of the respondent, obtained a rule calling upon the appellant to show cause why the case should not be struck out of the list of appeals, on the grounds,—that there was no notice in writing given by or on behalf of the appellant to the revising barrister in Court; that the revising barrister did not state the case for his decision, or read the statement, or endorse or sign it in open Court, or as required by the statute 6 & 7 Vict. c. 18, s. 42; that the requirements of the 44th section of the statute were not complied with, and no declarations were signed, and no respondent or appellant was appointed, as required by the last-mentioned section; and that the said B. C. Durant had been improperly entered as the respondent.

*206] The facts disclosed by the affidavits upon which the *motion was founded, were as follows:—Mr. Durant duly objected to the names of Thomas Scott and six others being retained on the list of voters for the borough of New Windsor. At a Court held by adjournment on the 28th of October, 1864, after hearing evidence and arguments in support and in opposition to the objections, the revising barrister decided against some of the objections, but held one of them to be fatal, and accordingly struck out the names of the persons objected to. After the decision, the attorney for the voters verbally applied to the revising barrister for a case. The latter stated that he

would grant a case if a question of law could be raised, and said that, if a case was taken, it must be submitted to Mr. Rogers (a solicitor of Reading, who had appeared for Durant) for revision, and that he should have an opportunity of raising the points which had been decided against him. Nothing more was done during the sitting of the Court, or at the rising thereof, beyond a further verbal statement made on behalf of the persons so struck out, that they intended to take a case and prosecute the appeal. On the 4th of November, between 11 and 12 o'clock in the morning, Mr. Long (the appellant's agent) brought Durant a case which he said had been prepared and perused but not finally settled by the revising barrister, and requested him to see Mr. Rogers, at Reading, and obtain his approval thereof; saying that he must have it back in the evening of that day, by post-time. Durant accordingly at once proceeded to Reading, but found that Mr. Rogers would not be at home until the following day; and, on his return to Windsor in the evening, he communicated to Mr. Long the result of his journey, and told him he could neither approve nor disapprove of the case, and that, as it was distinctly understood that Mr. Rogers was to have the case submitted to him for *his approval on his (Durant's) behalf before it was signed by [*207 the revising barrister, he (Durant) could not take upon himself the responsibility of assenting to the case as drawn up, and declined to sign it. On Saturday evening, the 5th of November,—which was the last day for lodging appeals under the statute,—Mr. Long called on Durant, and said he had got the revising barrister to sign the case: and he handed to him a document purporting to be a copy of the case as altered and settled and signed by the revising barrister, and which Mr. Long said he had lodged. No notice in writing of the desire of the parties whose names were so struck out, to appeal, was given either by themselves or by any other person on their behalf to the said revising barrister in Court, before the rising of the Court, on the same day on which the decision of the revising barrister striking out the said names was pronounced. The revising barrister did not state in writing the facts and his decision, and did not read the said statement in open Court to the appellants, and did not then and there sign the same. The appellant did not at the same time make a declaration in writing under his hand to the effect mentioned in the 42d section of the 6 & 7 Vict. c. 18; and the revising barrister did not then endorse upon any statement the name of the borough and of the parish to which the same related, or the Christian and surname and place of abode of the appellant and of the respondent, and did not then and there sign and date any such endorsement; and the revising barrister did not there and then deliver any such statement, with any such endorsement thereon, to the appellant, to be by him transmitted to this Court, as directed by the statute; nor did he direct the cases of the other parties to be consolidated with this appeal. There was no understanding between the parties whose names were struck *out as aforesaid, or their agents, and Durant or his agent, that [*208 any of the formalities required by the statute should be dispensed with.

The 42d, 43d, and 44th sections of the 6 & 7 Vict. c. 18 were

referred to; and it was submitted that they were imperative, and such as could not be dispensed with, even by consent.

ERLE, C. J.—You may take a rule: if the statement was considered as having been written down at the time, I incline to think it might be done nunc pro tunc. I see nothing in the statute to require us to press with undue rigour. We will do our utmost to do substantial justice between the parties.

*209] *R. Sawyer* now showed cause.(a)—The question *turns upon the construction of three sections of the 6 & 7 Vict. c. 18, which it is contended on the other side are imperative. The 42d section enacts that "it shall be lawful for any person who, under the provisions thereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case, either by himself or by some person on his behalf, to give to the revising barrister, in Court, before the rising of the said Court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal, and in such notice shall shortly state the decision against which he desires to appeal; and the revising barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which, according to his judgment, shall have been established by the evidence in the case, and which shall be material to the matter in question, and shall also state in writing his decision upon the whole case, and also his decision upon the point of law in question appealed against; and such statement shall be made as nearly as conveniently may be in like manner as is now usual in stating any

*210] special case for the opinion *of the Court of Queen's Bench upon any decision of any Court of Quarter Sessions; and the said barrister shall read the said statement to the appellant in open Court, and shall then and there sign the same; and the said appellant, or some one on his behalf, shall at the end of the said statement

(a) The affidavits in opposition to the rule stated in substance that both Durant and Rogers stated in open Court before the revising barrister that they would waive all objections in point of form, and would appear to answer the appeal, with a view of having the decision of this Court on the question raised, and that they did not insist upon a notice in writing of the desire of the persons whose names had been objected to to appeal against the decision of the revising barrister, or that he ought to state the facts in writing, or that he ought to read the statement of facts in open Court to the said persons whose names had been so objected to as aforesaid, or that he ought then and there to sign the same, or that the persons whose names had been so objected to ought to make a declaration in writing under their hands at the end of such statement, or that the said barrister ought to make any endorsements upon any such statement, or that the said barrister should then and there sign or date any such endorsement, or that the said barrister should then and there deliver the said statement to the appellants; that Durant stated in open Court before the revising barrister that he would consent to appear as respondent to defend the appeals upon the case to be granted by the revising barrister, and that the several appeals might be consolidated; that both Durant and Rogers stated in open Court that they would agree to any case which could be drawn up, so as to have the case fairly argued; and that, the case having been afterwards signed by the barrister and sent to Durant, the latter declined to sign it.

In other respects the statements in the affidavit filed on behalf of the respondent were not controverted.

make a declaration in writing under his hand, to the effect following, that is to say, 'I appeal from this decision;' and the said barrister shall then endorse upon any such statement the name of the county and polling-district, or city and (*a*) borough, and of the parish or township to which the same shall relate, and also the Christian name and surname and place of abode of the appellant and of the respondent in the matter of the said appeal, and shall sign and date such endorsement; and the said barrister shall deliver such statement, with such endorsement thereon, to the said appellant, to be by him transmitted to Her Majesty's Court of Common Pleas at Westminster in the manner thereinafter mentioned; and the said barrister shall also deliver a copy of such statement, with the said endorsement thereon, to the respondent in such appeal who shall require the same." The 43d section enacts, that, "in the matter of every such appeal, the party in whose favour the decision appealed against shall have been given shall be the respondent; but, if there be no such party, or if such party, or some one on his behalf, shall in open Court decline and state in writing that he declines to support the decision appealed against as respondent, then and in every such case it shall be lawful for the said revising barrister to name any person who may be interested in the matter of the said appeal, and who may consent, or the overseers of any parish or township, or the town clerk of any city or borough, to be, and such person so consenting, or such overseers or town clerk respectively so named, shall be deemed to *be the respondent or respondents in such appeal." And s. 44 enacts, that, "if it [*211 shall appear to any revising barrister that the validity of any number of such claims or objections determined by him at any Court as aforesaid depends and has been decided by him upon the same point or points of law, and the parties, or any of them, aggrieved by or dissatisfied with his decision thereon, shall have given notice of an intention to appeal therefrom, it shall in such case be lawful for the said barrister to declare that the appeals against such decision ought to be consolidated, and the said barrister shall in such case state in writing the case, and his decision thereon, in manner hereinbefore mentioned, and that several appeals depend upon the same decision, and ought to be consolidated, and shall read such statement, and sign the same as hereinbefore [s. 42] mentioned, and thereupon it shall be lawful for the said barrister to name any person interested, and consenting, for and on behalf of himself and all other persons in like manner interested in such appeals, to be the appellant or respondent respectively in such consolidated appeal, and to prosecute or answer the said appeal, in like manner as any appellant or respondent might in his own case under the provisions of this Act: and the person so named appellant in such consolidated appeal, or some one on his behalf, shall, at the end of the said statement, make and sign a declaration in the form or to the effect following, that is to say,—'I, for myself and on behalf of all the other persons who are interested as appellants in this matter, and whose names are hereunder written, do appeal against this decision, and agree to prosecute this appeal:" and the person so named respondent in such consolidated appeal, or some one on his behalf, shall in like manner make and sign a declaration in writing

(*a*) Sic.

*212] in the form or to the effect *following,—'I, for myself and on behalf of all the other persons interested as respondents in this matter, and whose names are hereunder written, do agree to appear and answer this appeal:' and the name, and, where necessary, the particulars of the qualification of every party intended to be joined in such consolidated appeal, shall be written under the aforesaid declaration of the appellant or respondent respectively to which they may respectively refer: Provided always, that it shall be lawful for the said barrister, if necessary, in any case to name the overseers of any parish or township, or the town clerk of any city or borough, to be, and they or he so named shall be, the respondents or respondent in such consolidated appeal, without any such declaration being made or signed by them or him as hereinbefore mentioned." It will be contended on the part of the appellant that these provisions are imperative and cannot be dispensed with. The signature of the barrister to the case may be affixed at any time. [KEATING, J.—In Withorn, app., Thomas, resp., 8 Scott N. R. 783, 7 M. & G. 1 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 125, an amendment was made in Court here.(a)] The provisions in ss. 42 and 43, it is submitted, are purely directory. There are no negative words, which in general are required to render *213] a statute imperative; as in ss. 62 and 64, which latter *section this Court in Autey, app., Topham, resp., 7 Scott N. R. 402, 5 M. & G. 1, 2 Lutw. Reg. Cas. 1,(b) held to be binding upon them. "If," said Tindal, C. J., in that case, "the case had stood upon the words of the 62d section alone, we might, perhaps, have been inclined to hold that they were directory only, and have let in the party to prosecute his appeal: but then comes the 64th section, by which it is provided that 'no appeal or matter of appeal shall be entertained or heard, unless notice shall have been given by the appellant to the Masters of the Court,' in the time and in the manner mentioned in the 62d section,—words so express and positive, that I do not see how we can by any possibility avoid their operation." Reliance will probably be placed upon the case of In re Knowles and Holden, 24 Law J., Exch. 223. There the parties to a plaint in a County Court appeared before a Judge, and consented to a reference, without objecting to the want of jurisdiction, but one of them, during the progress of the reference, objected to the jurisdiction of the arbitrators on the ground that title to land came in question, but the arbitrators never-

(a) That was to cure an ambiguity in the statement of the case.

In Nettleton, app., Burrell, resp., 8 Scott N. R. 738, 7 M. & G. 35, 1 Lutw. Reg. Cas. 157, the Court refused to entertain an appeal where the case had not been signed by the revising barrister. See also Burton, app., Brooks, resp., 11 C. B. 41 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 197, and Burton, app., Blake, resp., 11 C. B. 47, 2 Lutw. Reg. Cas. 197.

So, as to the signature of the endorsement: Wanklyn, app., Wollett, resp., 4 C. B. 86, 1 Lutw. Reg. Cas. 597. But see Pring, app., Estcourt, resp., 4 C. B. 71 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 605.

(b) See Simpson, app., Wilkinson, resp., 7 Scott N. R. 406, 5 M. & G. 3, n. (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 5; Colvill, app., Lewis, resp., 2 C. B. 60 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 380(a); Rawlins, app., The Overseers of West Derby, resp., 2 C. B. 77, 1 Lutw. Reg. Cas. 373; Newton, app., The Overseers of Mobberley, resp., 2 C. B. 203, 1 Lutw. Reg. Cas. 335; Pring, app., Estcourt, resp., 4 C. B. 73 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 543; Norton, app., The Town Clerk of Salisbury, resp., 4 C. B. 32, 1 Lutw. Reg. Cas. 538; Clarke, app., Beaton, resp., 5 C. B. 76 (E. C. L. R. vol. 57). But see Burton, app., Blake, resp., 11 C. B. 47 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 197.

theless proceeded with the reference: and the Court granted a prohibition. There, however, there was no jurisdiction *at the commencement:* here there was. And this was the ground of the decision in Andrewes *v.* Elliott, 5 Ellis & B. 502 (in error, 6 Ellis & B. *338). If consent can give jurisdiction, there was abundant [*214 consent here. It will be said that the revising barrister had no jurisdiction to do anything after the last day of October: ss. 33, 41. But those provisions apply to the holding of Courts, and the clauses regulating the appeal came after them. The Irish Registration Act, 13 & 14 Vict. c. 69, s. 46, prescribes the time of holding registry sessions for 1851 between the 1st of January and the 15th of February. In Agnew, app., Fowler, resp., 1 Irish Common Law Rep. 462, the assistant barrister signed the statement of facts and the appeal on the 15th of February; and it was held that he had no jurisdiction, and that the appeal could not be entertained. But there the mode of proceeding is very different; the revising takes place at the Sessions: here, it is a special Court. [WILLIAMS, J.—Unless you can rely on the consent, I fear you have no case.] Many cases may be cited where an Act of Parliament which fixes a time for the doing of an act has been held to be directory only. In Freeman, app., Read, resp., 30 Law J., M. C. 123, the appellant in an appeal against a highway-rate entered into recognisances to pay costs, as required by the 5 & 6 W. 4, c. 50, s. 105. The appeal was heard at the October Sessions, 1858, when the Justices confirmed the rate. Nothing was said at those Sessions as to costs; but by a standing order of Sessions, made in 1843, it was ordered that the costs of every appeal tried should be taxed by the clerk of the peace during the Sessions, and be paid by the unsuccessful party, unless the Justices who tried the appeal should order to the contrary. The clerk of the peace certified (under the 11 & 12 Vict. c. 43, s. 27), that, at the trial in October, 1858, the Justices had made no order to the contrary, and that the solicitors of the respective parties had agreed that the costs should be taxed out of Court; that, in *April, 1859, he attended the respondent's [*215 solicitor and taxed his costs at 33*l.* 7*s.*, the appellant's solicitor having objected to attend the taxation; and that the costs had not been paid to him, the clerk of the peace. A distress-warrant having issued, on application by the respondent, against the appellant, for these costs,—it was held by the Court of Queen's Bench that the distress-warrant had properly issued; that the appellant, by consenting at the trial that the costs should be taxed after the Sessions, was precluded from objecting that the taxation was not made at the Sessions; and that the Justices might well assume, it being so stated in the certificate of the clerk of the peace, that the appellant had consented. That case proceeded in a great measure upon the authority of The Queen *v.* The Shrewsbury and Hereford Railway Company, 25 Law Times 65, where it appeared that the taxation had been after the end of the Sessions, by consent; and, when the order of Sessions was brought up for execution, and the party who had so consented moved to set aside the order on account of such taxation after the end of the Sessions, Lord Campbell refused the rule, saying,—"The point is not now whether the Sessions had jurisdiction to make the order, but whether the appellants are not precluded by the Act from taking the

objection: and the Court holds that they are." The same was held in The Queen *v.* The Justices of Hampshire, 32 Law J. M. C. 46. [WILLES, J.—The whole subject was much discussed in The Queen *v.* The Mayor and Assessors of Rochester, 7 Ellis & B. 910 (E. C. L. R. vol. 90), (in error) 1 Ellis, B. & E. 1024 (E. C. L. R. vol. 96). ERLE, C. J.—Where a great duty is to be performed within a given time, and the time has been allowed to elapse, the Court will interfere, to prevent a public inconvenience. But that principle will hardly apply to a case like this.] Under the 2d section of the 20 & 21 Vict. c. 43, power is given *to appeal against a decision of *216] a Justice, provided a written notice be given *within three days after the decision*, and certain conditions precedent observed: the performance of these conditions has been held to be imperative by all the Courts.(*a*) But in none of those cases was there any consent.

Griffits, in support of his rule.—The short facts are these,—At the revising Court held on the 21st of October, Rogers appeared as the attorney for Durant, and urged two objections against the validity of the votes. The revising barrister took time to consider, and adjourned the Court to the 28th, when he gave a decision holding one objection to be valid, the other not. The attorney for the voters said he would appeal; but the revising barrister doubted whether there was any question of law upon which to found an appeal. At the end of the day,—both parties being desirous of waiving all technical objections, provided, of course, the person whose duty it was to prepare the case did it within a reasonable time,—it was understood that a case should be prepared by the attorney who represented the voters, and submitted to Rogers for his approval before the revising barrister was asked to sign it. No formal adjournment took place; and nothing was done until the 4th of November, when a case was forwarded to Durant containing only one of the points decided by the barrister. Durant thereupon proceeded to Reading for the purpose of getting Rogers to insert the facts raising the other point. Rogers being absent, *Durant was obliged to return the case unaltered, the *217] 5th being the last day for lodging appeals with the Master; and, as the case, as stated, did not truly represent the decision, he of course declined to assent to it. Under these circumstances, it cannot be contended that Durant gave any authority for the insertion of his name as respondent in the case which the revising barrister has so thought fit to sign, even if any consent could give jurisdiction. By the 33d section of the 6 & 7 Vict. c. 18, the revising Courts can only be held between the 15th of September and the last day of October. Power to adjourn from time to time is given by s. 41, "but so that no such adjourned Court shall be holden after the last day of October in any year." The jurisdiction of the revising barrister therefore was at an end before the case even in its imperfect state was presented to him for signature. The conditions annexed to the power to appeal by s. 42 must be strictly complied with. The party objecting must,

(*a*) See Woodhouse, app., Woods, resp., 29 Law J., Q. B. 164, Syred, app., Carruthers, resp., Ellis, B. & E. 469 (E. C. L. R. vol. 96), and Chapman, app., Robinson, resp., 1 Ellis & Ellis 25, in the Queen's Bench; Peacock, app., The Queen, resp., 4 C. B. N. S. 264 (E. C. L. R. vol. 93), in the Common Pleas; and Morgan, app., Edwards, resp., 5 Hurlst. & N. 415,† in the Exchequer.

before the rising of the Court on the day on which the decision shall have been pronounced, give a notice in writing to the barrister; and the barrister, if he thinks it reasonable and proper that such appeal should be entertained, is to state the facts and his decision, and to read the statement to the appellant in open Court, and then and there sign the same. The appellant, or some one on his behalf, is then to declare in writing his intention to appeal: and the barrister is to endorse the case and sign the endorsement, and to deliver the statement with such endorsement to the appellant, to be by him transmitted to the Court of Common Pleas. Nothing of this was done. It has always been held that a statutory jurisdiction must be pursued strictly. If it be said that consent will give jurisdiction,—which is denied,—there has been no unqualified consent here. The case of The *Queen *v.* The Mayor and Assessors of Rochester, 7 Ellis & B. 910 (E. C. L. R. vol. 90), in error 1 Ellis, B. & E. 1024 (E. C. L. R. vol. 96), proceeded upon the ground of the general jurisdiction of the Court of Queen's Bench to control all public officers, and to prevent injury arising to the public from their neglect or delay. In the ordinary case, unless a notice of appeal has been given, the Quarter Sessions have no jurisdiction: and, where a right of appeal is given subject to a condition, the condition must be performed. [WILLIAMS, J.—That argument would hold if there was the most express agreement and consent of the parties.] No doubt. It is conceded that the 62d section is imperative. [*218

ERLE, C. J. (stopping *Griffits.*)—I feel bound to give judgment in favour of making this rule absolute, on the ground that there has been no completed appeal.

The rest of the Court concurring, Rule absolute.

END OF THE REGISTRATION CASES.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1865.

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J., WILLES, J.,
WILLIAMS, J., KEATING, J.

MEMORANDA.

IN consequence of continued indisposition, The Hon. Mr. Justice Williams, who had filled the office of puisne Judge of the Court of Common Pleas since Michaelmas Term, 1846, retired from the Bench on the last day but one of this Term.

He was subsequently sworn in a member of the Judicial Committee of the Privy Council.

Montague Smith, Esq., one of Her Majesty's counsel learned in the law, was shortly afterwards appointed to fill the vacancy occasioned by the retirement of Mr. Justice Williams.

On being coifed, he gave rings with the following motto:—"Pro lege."

---

*220] *In Re COOPER and TILLOTSON'S Acknowledgments. *Jan.* 11

An acknowledgment by a married woman, under the statute 3 & 4 W. 4, c. 74, was taken in the state of Wisconsin, in the United States of America. The affidavit of verification was sworn before "E. B. Quince, notary public, Dane county, Wisconsin;" and annexed thereto was a certificate, signed by and under the seal of the secretary of state for Wisconsin, that E. B. Quince was a notary public in Dane county, duly appointed, qualified, and empowered by the laws of that state to administer oaths there.

The Court allowed the documents to be received and filed, though not strictly in compliance with the rule of Hilary Term, 14 G. 3.

THESE acknowledgments were taken at Madison, in the state of Wisconsin, in the United States of America. The affidavit of verification was sworn at Madison before E. B. Quince, notary public, Dane county, Wisconsin. Annexed thereto was a certificate signed by and under the seal of Lucius Fairchild, Secretary of State for the state of Wisconsin, in the United States of America, that E. B. Quince, whose name appeared subscribed to the annexed instrument, was at the date thereof a notary public in Dane county, duly appointed, qualified, and empowered by the laws of that state to administer oaths, take acknowledgments, &c. &c.

The registrar of deeds under the statute 3 & 4 W. 4, c. 74, having declined to enroll the certificates of acknowledgment, on the ground that the affidavit was not sworn before a person duly authorized,

McLeod moved that he might be directed to do so. He submitted that the rule of Court of Hilary Term, 14 G. 3,(*a*) which requires that the affidavit of *acknowledgment should be taken before some magistrate of the place, applies only to our own colonies, and [*221 not to foreign countries; and that all the Court requires, is, to be satisfied that the party administering the oath is qualified by law so to do, which, he contended, was abundantly testified here by the notarial certificate and the state seal of Wisconsin. And he referred to the case of In re Birch and Bell, 6 Scott 185, 4 N. C. 394 (E. C. L. R. vol. 33), where the Court allowed the acknowledgment of a married woman, taken at Hamburgh, to be filed, with an affidavit verifying the certificate of the due taking thereof, in the German language, sworn before the proper officer there, but not *signed* by the deponent, —it being sworn, that, by the practice of the country the affidavit is never signed by the deponent. [WILLES, J., referred to Ex parte Mary Ann Mann, 7 Scott 142, 5 N. C. 226 (E. C. L. R. vol. 35), where an affidavit verifying the taking of an acknowledgment by a married woman in the state of Illinois, U. S., was held to be properly sworn before a notary public of that place.]

ERLE, C. J.—In this case the acknowledgments were taken at Madison, in the state of Wisconsin, in the United States of America: and the affidavit of verification was sworn at Madison before a notary public, and it comes to us accompanied by a certificate signed by and under the seal of the secretary of state for the state of Wisconsin, that the person before whom it was sworn is a notary public and duly qualified as such by the laws of the state to administer oaths there. Now, the rule of Hilary Term, 14 G. 3, requires that the affidavit shall be sworn either before some person duly authorized to take affidavits in this Court, or before some *magistrate* of the place where the acknowledgment is taken, having authority to administer an oath,

(*a*) That rule provides, "that, if the party or parties shall be in Ireland, or in any other part or parts beyond the seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this Court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a notary public; which notary shall also certify in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same."

*222] and in *the presence of a notary public; and that the notary shall also certify in writing, under his hand and seal, as well the due administering of the oath, as also the name, signature, and office of the magistrate administering it. Here, the affidavit is sworn before a notary public of the place where the acknowledgments were taken, and the authority of the notary to administer oaths is certified by the secretary of state for Wisconsin, under the seal of the state,—exactly reversing the order of things mentioned in the rule of Court. The essence of the rule, I think, is, that the Court shall be satisfied that the affidavit has been sworn before some person who is duly qualified to administer oaths. In the case of Ex parte Mary Ann Mann, 7 Scott 142, 5 N. C. 226, we find, that where a commission was issued for taking the acknowledgment of a married woman at Illinois, another state of the Union, this very question arose, and the judgment of Tindal, C. J., was, that, upon the Court's being satisfied by affidavit that the notary public was by law duly authorized to take affidavits, the certificate and affidavit should be accepted. A similar question arose in a case still more recent, of Ex parte Hutchinson, 5 C. B. 499 (E. C. L. R. vol. 57), where the Court received an affidavit sworn before the British Consul at Madeira, the jurat describing him as being authorized by the laws of the island to administer oaths there, and the affidavit being accompanied by a notarial certificate to the same effect. I therefore think we keep within the course of precedent in granting this application.

The rest of the Court concurring, Rule granted.(a)

(a) See In re Eliza Hall, post, Easter Term.

---

*223] *In Re MARY DOWLING. *Jan.* 17.

Where part of the purchase-money is to be paid to the wife, the Court will not allow the certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be filed, without an affidavit of the commissioner taking it that he is satisfied from what passed before him that the lady was content that the money should be paid over to her without any settlement.

THE rule of Hilary Term, 4 W. 4, requires, that, in the affidavit of verification of the certificate of an acknowledgment by a married woman under the 3 & 4 W. 4, c. 74, it shall be deposed, amongst other things, that, previously to such acknowledgment being taken, the deponent had inquired of the married woman whether she intended to give up her interest in the estate to be passed, and also the answer given thereto, and, where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true; and that, where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision had been reduced into writing, which deed or writing he verily believes has been produced to the said Judge, &c.

In this case the affidavit stated, that, in answer to the inquiry of

the Commissioner, the lady stated that a sum of money (half the amount of the purchase-money) was to be paid to her in lieu of her interest in the estate; but it did not go on to state that she declared that she intended to waive any provision by deed. The registrar appointed under the Act having declined to act upon this affidavit,

Quain now moved that he might be directed to receive and file the documents. [WILLES, J.—The matters *which this affidavit [*224 omits are essential. Where the wife expects to receive some benefit from the arrangement, and a deed is necessary to secure that, the matter ought not to allowed to pass without her being informed of it. If the money were simply put into her hands, the husband or his creditors might take it.] It is competent to the woman to dispense with any provision. [WILLES, J.—She has not declared that she intended to do that. ERLE, C. J.—If the parties are acting in good faith, the money may be settled upon the wife. Nothing can be more illusory than placing the money in her hands. I think the registrar has done good service in sending this case up. Let the lady go before a Judge, and say whether she is content to give up her interest in the property without having any provision made for her.] The money has already been paid over to her by the purchaser. There may be a difficulty, therefore, in complying with the suggestion: the purchaser has no means of compelling the lady to go before a Judge. [ERLE, C. J.—The certificate of acknowledgment does not become a document of title until it has been filed. The parties have been somewhat premature in paying over the money. WILLES, J.—What are married women to do, if the Court permits property to be taken from them under such loose arrangements as this?]

ERLE, C. J.—Under the circumstances, we may allow the certificate to pass, if the Commissioner before whom it was taken will add an affidavit stating, that, from what passed before him, he is satisfied that the lady was content that the money should be paid over to her without any settlement. If that was clearly the intention of the lady, let the documents be filed: otherwise the matter must be mentioned again.

*The required affidavit was not produced to the officer, and [*225 consequently the documents were not filed.(*a*)

(*a*) See In re Mary Dixon, 4 C. B. 631 (E. C. L. R. vol. 56), where the Court refused to allow a certificate of acknowledgment by a feme covert to be filed, where it appeared from her answers to the inquiry of the commissioner as to whether she intended to give up her interest in the estate, without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will,—although it was shown *by another affidavit* that she perfectly understood that to be no provision, inasmuch as the will was revocable. And see In re Webber, 5 C. B. 179 (E. C. L. R. vol. 57).

FOY and Wife *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *Jan.* 14.

On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three feet. In so alighting, a lady, instead of availing herself of the *two* steps, with the assistance of a gentleman jumped from the *first* step to the ground, and sustained a spinal injury from the concussion. The jury having found that the Company were guilty of negligence in not providing reasonable means of alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her 500*l.*,—the Court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages.

THIS was an action against The London, Brighton, and South Coast Railway Company, for an injury sustained by the female plaintiff, under the following circumstances:—

The lady was a second class passenger by a train from Brighton to London, and, on the arrival of the train at the terminus in London, in consequence of there being two other trains before it on the same line, the whole of the train by which she had travelled was unable to come up to the platform, and she was desired by a porter to alight at a spot a little below the end of the platform. The dis-
*226] tance from the floor of *the carriage to the ground was about three feet, and there were two steps, the ordinary iron step, and a wooden one below it extending along the whole length of the carriage. The lady placed her foot upon the first step, and, taking the hand of a gentleman, jumped down. Being, however, in delicate health, the concussion seriously injured her spine.

On the part of the defendants, it was submitted that they were not responsible, inasmuch as the lady's own careless mode of alighting from the carriage, combined with her delicate state of health, had mainly caused the injury complained of.

The Lord Chief Justice, before whom the cause was tried at the sittings in London after the last Term, left it to the jury to say whether the accident was occasioned by the lady's own carelessness or by the negligence of the Company in not providing convenient means for descending from the carriage.

The jury returned a verdict for the plaintiffs, damages 500*l.*

Bovill, Q. C., now moved for a new trial, on the ground that there was no evidence to warrant the jury in finding that the Company had by themselves or their servants been guilty of negligence, and also that the damages were excessive. He submitted, that, having the option of descending by two steps, and not choosing to avail herself of the second, the lady was herself the cause of the accident; and that the case in this respect closely resembled that of Wilkinson *v.* Fairrie, 1 Hurlst. & Colt. 633,† where the plaintiff, a carman, being sent by his employer to the defendants' premises to fetch some goods, was, after waiting some time, directed by a servant of the defendants to go along a passage to a counting-house where he would find the
*227] warehouseman, and, the passage being dark, *in going along it he fell down a staircase and was injured: and the Court of Exchequer held that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the

staircase. [KEATING, J.—Is there no obligation on a railway Company to provide reasonably convenient means of ingress to and egress from their carriages?] In Cornmann *v.* The Eastern Counties Railway Company, 4 Hurlst. & N. 781,† the defendants, a railway Company, had on their platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing-machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas Day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it and was hurt: and it was held that there was no evidence of negligence on the part of the Company to go to the jury, the machine being in a situation where it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated. Here, if the lady had, instead of jumping as she did, turned herself round and availed herself of the assistance of both steps, and of the handles of the carriage, the accident could not have happened. In cases of this kind, as in actions for negligent driving, the Judge is not justified in submitting the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant: Cotton *v.* Wood, 8 C. B. N. S. 568 (E. C. L. R. vol. 98). The damages, at all events, are extravagantly excessive.

*ERLE, C. J.—It was for the jury to say whether or not the Company were guilty of negligence in not having provided convenience for getting down from the carriage. The jury have found that in the affirmative, and have negatived that the lady contributed to the accident. I do not feel authorized to interfere upon either ground. [*228

WILLIAMS, J.—I am of the same opinion. I think the conduct of the Company's servants warranted the jury in finding that the Company were guilty of negligence, because the place and the means of descent provided were not reasonably convenient. The finding of the jury negatives the lady's having by her conduct in any way contributed to the accident. In the present fashion of female attire, the mode of descent suggested by the learned counsel would be scarcely decent.

WILLES, J.—The only question was, whether under the circumstances it was a reasonable thing for the lady to get out of the carriage in the way she did. The finding of the jury disposes of that. And they are the constitutional judges of the amount of damages, and we only interfere in cases of misconduct or evident mistake.

KEATING, J., concurred.

No leave having been reserved, "unless the Court should think it ought to have been," *Bovill* asked whether he might have leave to appeal.

PER CURIAM.—We do not think this a fit case for an appeal.

Rule refused.

*229] *GRAHAM *v.* THE NORTH EASTERN RAILWAY COMPANY. *Feb.* 18.

1. Where a railway has running powers over the line of another Company,—*Quære*, whether it is not the duty of the former to see that its engines and carriages are reasonably adapted for safe travelling thereon.

2. In an action by the guard of a railway exercising such powers, for an injury sustained by him through his head coming in contact with a post on the servient railway, while looking out in the reasonable performance of his duty,—the jury having found that the position of the post was such as to be dangerous to a guard who is to keep a lookout reasonable for the safety of the train:—Held, that the servient railway Company were liable.

THIS was an action brought by the plaintiff, a guard employed by the North British Railway Company, against the North Eastern Railway Company, to recover damages for an injury sustained by him through the alleged faulty construction of the line of the latter Company.

The declaration stated in substance that the plaintiff was lawfully passing and being carried in a carriage upon the defendants' railway, and that a wooden post and timber gearing by the side of the same was by the negligence and default of the defendants placed and suffered to remain in so unsafe, dangerous, and improper a condition, state, and position,—which the defendants well knew, but of which the plaintiff was ignorant,—that, by the negligence, carelessness, and improper conduct of the defendants in that behalf, the plaintiff, whilst passing and being carried as aforesaid, was forced and came with great force and violence upon and against the said post and gearing, and thereby his head and face were greatly wounded and injured, and divers of his teeth were knocked out, and the plaintiff was rendered unfit for work, and incurred great expense for medical attendance, &c. Claim, 300*l.*

The defendants pleaded,—first, not guilty,—secondly, that, before the making of the agreement constituting Schedule B. to the North Eastern and Carlisle Amalgamation Act, 1862 (25 & 26 Vict. c. cxlv.), the said post and gearing were in the same condition and position as they were when the plaintiff was hurt; that the said railway was one which the North British Railway Company were by virtue of the said
*230] Act entitled to exercise running powers over, and lawfully *causing a carriage to pass along the said railway; that the plaintiff was a servant of the North British Railway Company by them employed in the course of his said service to accompany and attend the said carriage when passing along the said railway, for reward payable to the plaintiff by the North British Railway Company; that the plaintiff had the means of knowing the condition and position of the post and gearing, and might by the exercise of reasonable care have known of the same; that the North British Railway Company had always notice and knowledge of the same, and adapted the dimensions of their carriages and of their loads so as to avoid all danger from the position of the said railway post and gearing; that, for upwards of nineteen years before, persons knowing of the position of the post and gearing passed in safety in carriages upon the railway by the post and gearing, as the plaintiff might have done if he had had such knowledge; and that the risk from the railway post and gearing, and from the position thereof, and from the plaintiff's ignorance, and from the

neglect, &c., arising to the plaintiff while passing in a carriage along the railway, was a risk which the plaintiff voluntarily incurred and took upon himself and was to bear the consequences of, as incident to his service as such servant, in consideration of the said reward. Issue thereon.

The cause was tried before Pigott, B., and a special jury, at the last Durham Summer Assizes. The following admissions were put in:—

"1. That the Newcastle-upon-Tyne and Carlisle Railway Company, the Company which was dissolved by the North Eastern and Carlisle Railways Amalgamation Act, 1862 (25 & 26 Vict. c. cxlv.), were at the time of the erection and placing of the post and woodwork by which the plaintiff was on the 1st of November, 1863, hurt, the owners and proprietors of the *land and railway on and near which it was erected and placed, and that they until the said [*231 dissolution continued to be, and the defendants since that time have ever since been, and on the said 1st of November were, such owners and proprietors.

"2. That the said post and woodwork were erected and placed thereon under and by virtue of a certain agreement bearing date the 1st October, 1832; and that the Newcastle-upon-Tyne and Carlisle Railway Company according to the said agreement suffered and permitted the same to be so erected and placed, and afterwards kept and maintained, and the defendants after the said dissolution suffered and permitted them to be so kept and maintained until the plaintiff was so hurt; and that the defendants, so far as they are able, will grant the plaintiff an inspection of the said agreement and the plans, &c., if any, under which the post and woodwork were erected and placed, and will so far as they are able produce them at the trial, and consent to their being read and used as evidence, without further proof.

"3. That the North British Railway Company exercised running-powers over the railway at the place where the accident happened, pursuant to the agreement constituting Schedule B. to the North Eastern and Carlisle Railway Amalgamation Act, 1862; and that they were at the time of the accident exercising such powers while using the railway with the carriages in one of which the plaintiff met with the accident."

The facts proved on the part of the plaintiff were as follows:—The plaintiff was and had been for about two years a guard on the North British Railway, and had been in the habit of travelling for some time in the Company's carriages between Newcastle and Hexham twice every other Sunday. On Sunday the 1st of November, 1863, he left Newcastle to go to Hexham *in a second-class carriage, one compartment of which consisted of the guard's break-van, with [*232 a passenger-train. When just past the Bladen station, the driver shut off the steam to check the speed, when the plaintiff put his head out of the window of his van to see that all was right (as it was his duty to do), and was violently struck against a post at the side of the railway, and seriously injured.

The post against which the plaintiff struck formed part of a bridge across the railway supporting a tramway from the Stellastocks colliery, which was constructed in the year 1835 with the consent of the Newcastle and Carlisle Railway Company,—the post resting upon a block of stone on the line. The distance of this post from the window of

the van out of which the plaintiff was looking at the time of the accident was 16 inches. The distance between the post and the outer rail of the line was 28½ inches. The post was 14 inches out of the perpendicular, leaning inwards, and was so when the bridge was originally constructed.

The plaintiff stated that he was not acquainted with the position of the post or the construction of the Stellastocks Bridge.

The van in which the plaintiff was riding was an ordinary-sized van of the North British Railway Company. Its width was 7 feet, 8 inches,—which was wider than the ordinary vans belonging to the North Eastern Railway Company. There was a window at the top through which the guard might see from one end of the train to the other over the roofs of the carriages; but, in order to look along the sides, it was necessary for him to put his head out of the window at the side. The same carriage had gone over the line in question for about fifteen months: and no accident had ever before happened at this spot.

*233] *The North British Railway Company had running-powers over this section of the North Eastern Railway Company's system of railways, under the agreement set out in Schedule B. of the North Eastern and Carlisle Railways Amalgamation Act, 1862.

By article 1 of that agreement it was provided as follows:—"The Company shall at all times hereafter permit the North British Company, with their engines, carriages, &c., to run over and use the Newcastle and Carlisle Railway, sidings, junctions, stations, &c., upon that railway, between the Hexham Junction and the Central Station at Newcastle, and the station at Redheugh, and any contiguous stations which the North British Company may acquire or construct, subject to the payment by the North British Company to the Company for such user, of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues, as have or has been or shall be agreed upon by and between the said Companies, or, in default of such agreement, as shall be fixed by arbitration, in manner hereinafter provided."

And article 5 provides as follows:—"The entire control and management of the several stations at which the North British Company are to be accommodated, and the clerks, porters, and other servants thereat, shall remain exclusively with the Company, but shall not be exercised so as to limit in any degree the full enjoyment by the North British Company of the privileges at and in connection with those stations to which under this agreement, or under the North British Border Counties Amalgamation Act, 1860 (23 & 24 Vict. c. cxcv.), or under any agreement between the Company and the North British Company from time to time in force, the North British Company shall be entitled."

*234] On the part of the defendants, it was submitted that *there was no case to go to the jury, the post and gearing not being the property of the Company. But, upon the learned Baron intimating that he should ask the jury to find whether or not the post stood upon the defendants' line, this objection was not pressed.

It was further submitted that there was no evidence of negligence on the part of the defendants; and that, the North British Railway Company, having running-powers over a section of an already-con-

structed line of railway, were bound to use their privilege with carriages so constructed as to suit its requirements.

The learned Baron intimated that it would be for the jury to say whether there was negligence or not.

The engineer and the manager of the Newcastle and Carlisle section of the North Eastern Railway were called. The former stated that the bridge at the Stellastocks was constructed under his direction in the year 1835, that the present inclination of the post in question was its original position, and that no accident had ever occurred there. He further stated that the rolling stock of the North Eastern Railway Company runs throughout their lines, *except the vans;* that the Newcastle and Carlisle vans are kept to their own section; that the width of the North Eastern vans is 7 feet, 5½ inches, and that of those of the Newcastle and Carlisle section 6 feet, 10 inches; and that, if one of the vans of the Newcastle and Carlisle section had been used on this occasion, the distance between the window and the post would have been 1 foot, 7¾ inches. The manager stated that the "clearing system," to which all the railway Companies are privy, ascertains the width of load proper to the Newcastle and Carlisle section of the North Eastern Railway to be 8 feet, 6 inches maximum; that on the rest of the North-Eastern Railway, except the main line, being 9 feet.

*The learned Judge left it to the jury to say,—first, was the position of the wooden post such as to be dangerous to a guard who is to keep a look-out as stated in the Company's rules, or a look-out reasonable for the safety of the train?—secondly, did the plaintiff know of the position of the post, or could he by the exercise of reasonable care have known it, so as to avoid it?—thirdly, was the North British van a wider carriage than was proper with reference to the clearing-house rules?—fourthly, did the plaintiff by any negligence of his contribute to the accident?—lastly, was the construction of that van improper as to the means of looking out? [*235

The jury answered the first question in the affirmative, and all the others in the negative: and they returned a verdict for the plaintiff, with 80*l.* damages.

The learned Baron reserved leave to the defendants to move to enter a nonsuit, if upon the findings and the facts the Court should be of opinion that the plaintiff was not in point of law entitled to maintain the action. He also reported that he thought the findings right.

Mellish, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

S. Temple, Q. C., and *T. Jones* now showed cause.—There was abundant evidence to go to the jury of negligence on the part of the defendants. The contention on the other side will be, that, the North British Railway Company having taken running-powers over the Newcastle and Carlisle Railway under the agreement set out in Schedule B. to the North Eastern and Carlisle Railway Amalgamation Act, 1862, the former Company were bound to take the line as they found it, and to accommodate the width and construction of their carriages to its condition. The jury have found that the position of the post at Stellastocks Bridge was dangerous [*236

and improper; and, though it was placed where it now stands in 1835, when the defendants had no interest in that part of the line, they are nevertheless responsible for keeping a dangerous structure upon the line after it came into their hands. Subject to the due exercise of the powers conferred upon the Company by their Acts of Parliament, the public have a right while passing along the line to be protected from everything that is dangerous. The length of time that the post has stood where it is without accident, affords only ground for an argument that the danger was not imminent. The 1st article in the agreement in Schedule B. of the 25 & 26 Vict. c. cxlv., which provides that the North British Company may traverse this portion of the line with their engines, carriages, &c., authorizes them to traverse it with such carriages as they are in the habit of using. It is no excuse for the defendants to say that the carriages are wider than their line will reasonably accommodate. Besides, the evidence shows that the carriages of the North British Railway Company are within the dimensions stipulated for in the clearing-house rules. The case of Parnaby *v.* The Lancaster Canal Company, 11 Ad. & E. 223 (E. C. L. R. vol. 39), 3 P. & D. 162, 1 Railway Cases 696, shows that it is a duty imposed by the common law upon a public Company to prevent accidents arising from obstructions in a canal or railway. Tindal, C. J., delivering the judgment of the Exchequer Chamber in that case, says: "The facts stated in the inducement show that the Company made the canal for their profit, and opened it to the public upon the payment of tolls to the Company: and the common law in such a case imposes a duty upon the proprietors, not, perhaps, to repair the canal, *237] or absolutely to free it from *obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." That duty has clearly been neglected by these defendants.

Mellish, Q. C., and *Davison*, in support of the rule.—The question involved in this case is one of vast importance to railway Companies throughout the kingdom. The carriage in which the plaintiff was when the misfortune befell him belonged to the North British Railway Company, and the plaintiff was a guard in their service. The line of railway upon which the train was running, was one of the lines under the management of the North Eastern Railway Company, over which the North British Railway Company possessed running-powers by virtue of the statute 25 & 26 Vict. c. clxv. This line was one of the earliest which was constructed, and it came into the possession of the defendants under the provisions of that Act. If the plaintiff had been riding in one of the defendants' carriages, the accident confessedly would not have happened. Assuming that this section of the line with its bridges was so narrow as to necessitate the use of carriages exceptionally narrow, it was the duty of the North British Railway Company, before they began to exercise their running-powers over it, to provide carriages fitted for the exigencies of the line. They could not call upon the defendants to alter the line: and the defendants could not remove the post without the leave of the owners of the Stellastocks colliery. No such duty as that spoken of in Parnaby *v.* The Lancaster Canal Company can be by law imposed upon these

defendants. [KEATING, J.—If one of the public wanted to exercise the power of running his own engine and *carriage on the line in question, he would be bound to construct them so as to satisfy the engineer of the Company.] Doubtless he would. The ordinary course of railway legislation at the present day, is, to confer running-powers almost without limit. Suppose a railway company acquires running-powers over a portion of another Company's line, and the carriages of the latter are provided with bars to prevent passengers from putting their heads out of the windows, and those of the former are not, would the latter Company be liable for an injury resulting to a passenger of the former Company by reason of the absence of that precaution? There is no inherent vice in the construction of the Newcastle and Carlisle portion of the railway; and the accident occurred solely in consequence of the greater width of the North British Company's carriages. [KEATING, J.—The jury have not found that the post was dangerous with reference to any particular width of carriage.]

[*238

ERLE, C. J.—Having regard to the finding of the jury in this case, I feel bound to come to the conclusion that the rule must be discharged. The jury have found that the position of a particular post upon the defendants' line was such as to be dangerous to a guard who is to keep a look-out reasonable for the safety of the train. And that is found in absolute and unqualified terms. If the facts would have warranted Mr. *Mellish's* argument, I should have been strongly inclined to think that a railway Company taking running-powers over an existing line must take care to have their carriages so constructed as to be reasonably adapted for travelling upon that line: and, if the jury had found here that the accident was occasioned by the excessive relative width of the North British Railway Company's carriages, I should *probably have yielded my assent to that argument. But the finding of the jury precludes me from that. [The rest of the Court (BYLES, J., was at Chambers) concurring,] Rule discharged.

[*239

When running powers over a railway have been granted, or a lease of it made, the respective liabilities of the dominant and servient companies—the lessor and lessee—for injuries occasioned by the ill condition of the road do not appear to be distinctly defined by adjudication.

A number of decisions recognise the responsibility of a railroad Company for all the tortious acts of their lessees, as agents, when the lease has not had legislative approval, on the ground that it would contravene public policy if the grave duties of such Companies should be delegated at will, and they should be thus enabled to escape from their legal obligations: Pierce on Am. R. R. Law 244; O. & Miss. R. R. Co. *v.* Dunbar, 20 Ill. 623; Chicago & Rock Isl. R. R. Co. *v.* Whipple, 22 Id. 105.

But it would seem that in cases standing in a different predicament, *i. e.* when the lease has been approved by the Legislature, either by special Act or under a general law allowing the letting of railroads, the liability of the lessor for torts of the lessee ought not to exist. There is no longer the relation of principal and agent between them, and the law which permitted a divided possession of the road would hold each to a separate responsibility, measured by the control of each over the road: Sprague *v.* Smith, 29 Vt. 423; Redf. on R. 435; McCall *v.* Chamberlain, 13 Wis. 637. See Fletcher *v.* Boston & Maine R. R. Co., 1 Allen 9. On each would devolve the public duty of keeping the road in a safe condition for travel to any one lawfully upon it

The degree of diligence requisite under these circumstances is incidentally referred to in Schapman *v.* B. & W. R. R. Co., 9 Cush. 30. See Mr. Wharton's note to 4 H. & N. 736.

A similar point to that presented in the text was decided recently in Massachusetts (Snow *v.* The Housatonic R. R. Co., 8 Allen 441). The W. R. R. Co., had a right by agreement to use the tracks and switches of the H. R. R. Co. at D., for the passing of cars and engines, and the distribution of freight. A servant of the W. R. R. Co., engaged in distributing freight at D., was injured by a defect in the planking on the road-bed. Held, that the H. R. R. Co., was liable.

COX *v.* BOCKETT and Others. *Jan.* 10.

It is no answer to an application for the address of the plaintiff, under the 7th section of the Common Law Procedure Act, 1852, that the defendant makes it for the purpose of enabling him to enforce against the plaintiff an attachment out of the Court of Chancery for non-payment of costs in a suit there.

Discovery under s. 50 of the Common Law Procedure Act, 1854, refused, in an action against an attorney for alleged negligence and misconduct as attorney for the plaintiff,—the object of the application being to compel the production of the defendant's books, for the purpose of inspecting entries therein upon which it was surmised were founded the items in a certain bill of costs which had been delivered by the defendant to the plaintiff.

KEANE, Q. C., moved to set aside an order made by Willes, J., at Chambers, calling on the plaintiff's attorney, under the 7th section (*a*) of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), to furnish the address of his client. The objection to complying with the order was, that the information was not wanted for the bonâ fide purpose of the section, but for the purpose of enabling the defendants *240] to execute *a writ of attachment for non-payment of certain costs in a Chancery suit, under the circumstances detailed in the plaintiff's affidavit. He referred to Harris *v.* Holler, 19 Law J., Q. B. 62, where a similar application was refused by Patteson, J., at Chambers, where the plaintiff, a female, who had been employed by the defendant to take care of his house, but who had subsequently left it, brought an action against him for breach of promise of marriage; the order being resisted on the ground that the defendant had threatened to proceed criminally against the plaintiff on a charge of taking away from the house some property belonging to him; and, on the application being renewed before the same learned Judge in the Bail Court, his Lordship said: "When the matter was before me at Chambers, I thought that the avowed object of the application, which was to enable the defendant to arrest the plaintiff in a criminal proceeding, was so collateral to the action that I ought not to interfere. I remain of the same opinion. The defendant knows who the plaintiff is perfectly well. I have always thought that applications of this

(*a*) Which enacts that "every attorney whose name shall be endorsed on any writ issued by authority of this Act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity: and, if he shall answer in the affirmative, then he shall also, in case the Court or a Judge shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued: and, if such attorney shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge."

sort are entertained by the Courts with a view of preventing sham actions; and I do not feel myself justified in assisting criminal proceedings in this manner by a step in a civil suit." [WILLES, J.—The case referred to was one where the party sought to avail himself of the provision in the Common Law Procedure Act for the purpose of forwarding a criminal proceeding. Here, the defendants are only seeking to enforce a cross-claim. I thought it quite a matter of course to make the order, that the defendants might have an opportunity to obtain their costs. WILLIAMS, J.—If the defendants have a right conferred upon them by the statute, an inquiry into their motives seems to me to be quite out of place.] The statute gives a discretion *to the Court or Judge: and the question is whether this is a [*241 case in which that discretion should be exercised. This discretion is exercised strictly under the 51st section: for, in Pearson *v.* Turner, 16 C. B. 157, it was held that a defendant in ejectment will only be allowed to deliver interrogatories to the plaintiff under that section, where his affidavit discloses special circumstances which satisfy the Court or Judge that justice requires it.

ERLE, C. J.—I think there should be no rule. The application is to rescind an order of my Brother Willes for the disclosure of the plaintiff's address, under the 7th section of the Common Law Procedure Act, 1852, on the ground that it is wanted, not for the purpose of ascertaining that the action is brought by a real person, but for the purpose of serving the plaintiff with an attachment for non-payment of costs of certain Chancery proceedings. It seems to me that the defendants have a right to know the address of their adversary, and that we have no right to narrowly scan their motives in asking for the information.

WILLES, J.—I am of the same opinion. I did not mean to suggest that the Judge at Chambers is not to exercise a discretion under the section in question. I do not at all quarrel with the decision of Patteson, J., in Harris *v.* Holler. As at present advised, I think it was quite right. A Judge at Chambers may well say that he was administering civil law only, and therefore ought not to be called upon to assist in forwarding a criminal proceeding.

The rest of the Court concurring, Rule refused.

Jan. 27. An application having been made to Byles, J., at [*242 *Chambers, without success, for an order upon the defendants for discovery, under s. 50 of the Common Law Procedure Act, 1854,

Keane, Q. C., now renewed the application, upon an affidavit which disclosed that the action was brought against the defendants charging them with negligence and misconduct as attorneys for the plaintiff. The discovery sought was of original entries in the defendants' books, on which were founded the items of charge in a certain bill of costs which the defendants had delivered to the plaintiff. [ERLE, C. J.—In this action charging misconduct and negligence, I see no right the plaintiff can have to look at the defendants' books.] The entries would, or at least might, show that the defendants were acting as the plaintiff's attorneys; and that is enough to entitle him to a discovery.

ERLE, C. J.—I think my Brother Byles exercised a very wise

discretion in refusing the order. The power of permitting private papers and books of a party to be looked at by his adversary is one which is to be exercised with the greatest caution and reserve. This clearly is not a case for it.

The rest of the Court concurring, Rule refused.

---

*243] *FREDERICK HAYES WHYMPER, Appellant; JOHN JONES HARNEY, Respondent. *Jan.* 25.

The weaving or plaiting by steam or other mechanical power of cotton thread into a covering for strips of steel to be used for making "crinoline skirts," is a manufacture or process incidental to the manufacture of a cotton fabric, within the meaning of the 73d section of the Factory Act, 7 & 8 Vict. c. 15.

THIS was a case stated for the opinion of the Court under the 20 & 21 Vict. c. 43.

1. On the 14th of October, 1864, John Jones Harney (hereinafter called the respondent) appeared in petty sessions before the mayor and justices for the borough of Sheffield, to answer to a summons issued on the complaint of Frederick Hayes Whymper, sub-inspector of factories (hereinafter called the appellant), charging that he the respondent had offended against the 13 & 14 Vict. c. 54, intituled "An Act to amend the Acts relating to labour in factories," forasmuch as he, the respondent, on the 26th of August last past, at the parish and borough of Sheffield, did unlawfully employ a female above the age of eighteen years, named Charlotte Roxburgh, in the factory of him the respondent after six of the clock in the evening of the said day, to wit, at thirty minutes past the same hour (and not to recover lost time, as provided by the said Act.)

2. The respondent is the occupier of premises in Granville Street, in Sheffield, in which he carries on the trade of a manufacturer of crinoline steel and crinoline skirts. There is a steam-engine on the premises, the power of which is employed to move and work machinery in three rooms used in cutting steel into strips, and working and preparing such strips as hereinafter described, and also in wrapping or covering the strips of steel with cotton thread as hereinafter described. There are four other rooms in the premises in which by hand sewing-machines steel strips are inserted into skirts, and the skirts finished for market. The course of manufacturing

*244] crinoline steel, *is, that the respondent purchases of the steel manufacturers sheets of steel rolled very thin, about three inches in width, and about fifty feet in length, which sheets are cut by circular shears into strips of from one inch to three-sixteenths of an inch in width. These strips are then riveted together by the ends in lengths of 1000 yards or thereabouts, and reeled or wound into coils of about 80 lbs. each. The coils are then unwound; and, as the strip of steel passes along, it is exposed to the influence of heat, then to that of oil, and passed over or between chilled dies or plates of cold steel: by this operation the steel strips are hardened, and, being again heated, become properly tempered: they are then ground or polished, and blued in a finished state, and are then again reeled

or measured out into coils of 36, 72, or 144 yards each. In this process women are employed. Some portions of such coils are sold or used up into skirts without undergoing any other process than has been above described; but other portions are previously wrapped or covered with cotton thread. This cotton thread is invariably purchased by the respondent from spinners or their agents in hanks or bundles, which on the respondent's premises undergo no further manufacturing process, but by means of steam-power are next wound or reeled upon bobbins of various sizes for more convenient application around or about the strips of steel. One process of such application is effected by a machine called a wrapping-machine, which by steam-power turns the cotton thread in single file round and round the strips of steel. The other process or application of the cotton thread is effected by a machine called a plaiting-machine, which by steam-power effects a covering for the steel by the interlacing or plaiting of sixteen threads together around and over every part of the strips. In the process of covering the steel with *cotton, [*245
as above described, by steam-power, women are employed. The whole of the rooms and premises are within one boundary or curtilage.

3. On the hearing of the complaint before the justices, the appellant proved that he was sub-inspector of factories for the district in which Sheffield is included; that, on the 26th of August last, in consequence of some information, he went to the works of the respondent, in Granville Street, Sheffield, between half-past six and quarter to seven o'clock in the evening; and, on going up stairs, he found in a first room a number of girls and young women standing in an opening in one side of the room, which he could best describe as resembling the bar of an inn; that the persons were in the act of delivering their work to a woman inside an apartment where the skirts are received after they are made; that Charlotte Roxburgh, named in the information, was at the bar delivering or passing over skirts; that he, the appellant, proceeded into a further room, and there, seated on benches by the side of long tables, he found a second and larger number of females occupied in making up crinoline skirts; that two male assistants of the respondent were present; that he, the appellant, pointed out to them what he conceived to be the illegality of the proceedings in their being employed after 6 o'clock; that he, the appellant, had on previous occasions been in other parts of the respondent's premises; that there is machinery propelled by steam-power, and the process in such other parts carried on is the covering of steel with cotton by machinery which twists or winds the cotton round the steel; that the rooms in which the young women were working were within the outer gate and the boundary walls of the premises where the steam-power is applied; and that some of the young women were employed in inserting or securing *the covered steel into [*246
skirts for garments called crinoline skirts.

4. On cross-examination by the respondent's attorney, the appellant stated that he saw no machinery in the two rooms; that the young women could have done the work they were upon just as well at their own homes; and that the respondent is what is termed a crinoline manufacturer.

5. The skirts referred to in the above evidence are composed of gores cut from pieces of calico, nets, or plain or coloured cloths of various kinds, and sewed together, into the folds or hems of which the strips of steel are run or inserted; and so the articles are formed into the female garment or appendage called a crinoline skirt.

6. On the above statement of facts and evidence, the justices were of opinion that the respondent's premises at Sheffield were not and could not be called or considered in the ordinary use of words a cotton-mill, and did not become a cotton-mill or factory within the intent of the 3 & 4 W. 4, c. 103, by reason of the application of steam-power to machinery used therein for manufacturing steel and cotton thread and other materials into crinoline by the means and in the manner hereinbefore described. They were also of opinion, that, on such premises, and for such a purpose, the process of wrapping or covering by machinery crinoline steel with cotton thread was not within the meaning of the 7 & 8 Vict. c. 15, s. 73, a process incident in any way to the manufacture of cotton, or to any fabric made thereof or mixed therewith, but was incident to the manufacture of crinoline, in like manner as the covering or wrapping of driving or riding whips (if effected by machines of the same character) with silk twist or strong linen thread and other materials, would not be a *247] process incident to the manufacture of silk or *linen, or to any fabric made thereof, but would be a process incident to the making of whips. They therefore dismissed the summons.

7. If the Court should be of opinion that their determination was correct, the same was to be confirmed: if otherwise, the Court was to make such order as to the Court might seem fit.

Hannen (with whom was *The Solicitor-General*), for the appellant.(a) —The question is whether the place described in the case is a "factory" within the 3 & 4 W. 4, c. 103, or the 7 & 8 Vict. c. 15, s. 73. By the 1st section of the former Act it is enacted, that, "no person under eighteen years of age shall be allowed to work in the night, that is to say, between the hours of half past 8 o'clock in the evening and half past 5 o'clock in the morning, except as hereinafter provided, in or about any cotton, woollen, worsted, hemp, flax, tow, linen, or silk mill or factory, wherein steam or water or any mechanical power is or shall be used to propel or work the machinery in *248] such mill or factory, either *in scutching, carding, roving, spinning, piecing, *twisting, winding*, throwing, doubling, netting, making thread, dressing or weaving cotton, wool, worsted, hemp, flax, tow, or silk, either separately or mixed, in any such mill or factory situate in any part of the United Kingdom of Great Britain and

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That the premises of the respondent in Granville Street, Sheffield, in which by the aid of steam and other mechanical power he carried on the trade of a manufacturer of crinoline steel and crinoline skirts, were 'a cotton-mill' or 'factory' within the meaning of the 3 & 4 W. 4, c. 103, s. 1, and 7 & 8 Vict. c. 15, s. 73:

"2. That the word 'winding' mentioned in the 3 & 4 W. 4, c. 103, s. 1, includes the process carried on by the respondent at his premises in Sheffield, of winding or reeling cotton by steam-power upon bobbins, as found in the case:

"3. That the word 'twisting' mentioned in the 3 & 4 W. 4, c. 103, s. 1, includes the process carried on by the respondent at his premises in Sheffield, of interlacing or plaiting of sixteen threads together by steam-power round and over every part of the strips, as found in the case."

Ireland." This Act was extended by the 7 & 8 Vict. c. 15, the 73d section of which defines "factory" as follows,—"The word 'factory,' notwithstanding any provision or exemption in the Factory Act, shall be taken to mean all buildings and premises situated within any part of the United Kingdom of Great Britain and Ireland, wherein or within the close or curtilage of which steam, water, or any other mechanical power shall be used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, or tow, either separately or mixed together, or mixed with any other material, or any fabric made thereof; and any room situated within the outward gate or boundary of any factory wherein children or young persons are employed in any process incident to the manufacture carried on in the factory shall be taken to be a part of the factory, although it may not contain any machinery; and any part of such factory may be taken to be a factory within the meaning of this Act; but this enactment shall not extend to any part of such factory used solely for the purposes of a dwelling-house, nor to any part used solely for the manufacture of goods made entirely of any other material than those herein enumerated, nor to any factory, or part of a factory used solely for the manufacture of lace, of hats, or of paper, or solely for bleaching, dyeing, printing, or calendering." Then comes the 13 & 14 Vict. c. 54, s. 1, which, after reciting the two Acts above mentioned, and also the 10 & 11 Vict. c. 29, *enacts, that, "save as thereinafter mentioned, so much of the said Acts as restricts or limits the hours of the employment or labour of any young persons, and of females above the age of eighteen years, shall be repealed, and after the passing of this Act no young person, and no female above the age of eighteen years shall be employed in any factory before six of the clock in the morning, or after six of the clock in the evening of any day (save to recover lost time, as thereinafter provided), and no young person, and no female above the age of eighteen years shall be employed in any factory, either to recover lost time, or for any other purpose, on any Saturday after two of the clock in the afternoon." It is submitted that this is a "factory" within that definition, because steam-power is used therein in winding and twisting cotton, and not merely, as contended on the other side, in the manufacture of "crinoline-steel" and "crinoline-skirts." The mischief intended by the Act to be guarded against will be equally effected by carrying on the process in combination with steel as without it. In Haydon, app., Taylor, resp., 33 Law J., M. C. 30, the respondent was the owner of premises in Mansfield Street, Leicester, in which he carried on the manufacture of cotton sewing-thread: he also had other premises in Leicester to which he was in the habit of sending the thread in hanks, and where it was wound by machinery moved by steam-power, first, on to cops, and secondly on to spools. No other process except this particular winding was carried on in the last-mentioned premises: and it was held that these latter premises were a mill or factory within the meaning of the 3 & 4 W. 4, c. 103, s. 1. Wightman, J., in the course of the argument, said: "Probably the intention of the legislature was to protect the health of young children, and it makes no difference whether the child was employed in the earlier or the later

[*249

*250] processes; *it is clearly within the meaning of the statute." There are two windings here,—from the spools on which the cotton was brought into the respondent's premises, to other spools, and then round the strips of steel which are to form the skirts. Is it the less a manufacture because it is wound on and round the steel? The case of Taylor, app., Hickes, resp., 12 C. B. N. S. 152 (E. C. L. R. vol. 104), affords a good illustration of the meaning of the statute. There, the appellant was the occupier of premises in Birmingham in which steam-power was used to work machinery employed in manufacturing cotton and wool into "webbing," of which he made men's braces and horses' girths, by cutting the material into lengths, and sewing pieces of leather and buckles thereto. The buildings formed an enclosed square, entered from the street by a gateway: on the left was the building in which the steam-power was used, and the webbing manufactured: on the right, within the curtilage, the manufacture of braces and girths was carried on in rooms entered from the square. One Heeley, a child under 13, was engaged in the last-mentioned manufacture. His occupation was, the preparation of the pieces of leather for attaching to the webbing, by boring holes round the edges with an awl. No part of the webbing was ever placed in his hands or brought into the room; nor was there any machinery in the room where he was so employed. And it was held that this was an employment in a "factory," within the meaning of the Factory Acts.

Quain, for the respondent.—These statutes are of a highly penal character, and are not to be extended to a manufacture which does not come strictly within their provisions. The main object of the first Act, 3 & 4 W. 4, c. 103, was, to limit the hours of labour in fac-

*251] tories. It recites that "it is necessary that the *hours of labour of children and young persons employed in mills and factories should be regulated, inasmuch as there are great numbers of children and young persons now employed in mills and factories, and their hours of labour are longer than is desirable, due regard being had to their health and means of education." The 2d section enacts that no person under the age of eighteen years shall be employed in any such mill or factory, in such description of work as aforesaid, more than twelve hours in any one day, nor more than sixty-nine hours in any one week, except as thereinafter provided; and there is a further limitation of the number of hours for the employment of children under the respective ages of eleven, twelve, and thirteen years, in s. 8. [Erle, C. J.—The statute 13 & 14 Vict. c. 54, assumes it to be a presumptio juris that young persons and females found working in a factory or mill after 6 o'clock in the evening, have been working since 6 o'clock in the morning. Williams, J.—I do not think the Act of Parliament is susceptible of your construction.] The object manifestly was, to limit the hours of working in the case of women and children. [Erle, C. J.—The statute contemplates a maximum number of hours, and also prohibited hours. The words are very distinct.]

Then, this is not a factory within the meaning of the Acts. The legislature in the first Act restricting free labour,—the 3 & 4 W. 4. c. 103,—and in the 7 & 8 Vict. c. 15, s. 73, evidently contemplated cotton-mills or factories strictly and properly so called. The informa-

tion is founded upon the 13 & 14 Vict. c. 54, s. 1, and the penalty is imposed by the 7 & 8 Vict. c. 15, s. 56. The process here carried on was not the twisting and winding of cotton; neither was it a manufacture of a fabric composed of cotton and steel combined. The winding of cotton round the steel strips cannot be *called "a process incidental to the manufacture of cotton." ERLE, C. J.— [*252 The 73d section of the 7 & 8 Vict. c. 15, contains the words "or mixed with any other material." WILLES, J.—The article manufactured here is of cotton combined with steel. Is it the manufacture of an article of cotton *mixed with* steel?] It is submitted not. ERLE, C. J.—A factory for the manufacture by steam or water power for the manufacture of articles of female attire composed of cotton and india-rubber, would clearly be within the Acts. KEATING, J.—Suppose the fabric for covering the steel alone was made on the respondent's premises, would not that constitute them a "factory" within the Acts?] That is supposing that which cannot be. Cole, app., Dickinson, resp., 16 C. B. N. S. 604 (E. C. L. R. vol. 111), is an authority to show that the statute is not to be extended. [ERLE, C. J.—In that case, the article made was to be used in the manufacture of paper; it was part of the process of paper-making; and that is a manufacture which is specially excepted out of the statute.] Haydon, app., Taylor, resp., 33 Law J., M. C. 30, does not govern this case. It was expressly found there that the respondent was the owner of a factory in which he carried on the manufacture of cotton thread.

Hannen, in reply.—The notion that a penal statute is to receive a different construction from that which is to be put upon any other class of statutes has been long exploded; and, if it were necessary, it might be contended that the statutes now under consideration are of a remedial character, and ought to be construed so as to suppress the evil, and to advance the remedy. As to the twelve hours, there can be no doubt. [WILLIAMS, J.—It is impossible to get over the plain words of the Act.] The statute 3 & 4 W. 4, c. 103, does not define what is a "factory:" but it enumerates a *variety of processes [*258 in the manufacture of cotton and certain other materials,— including *twisting* and *winding*,—by means of machinery, in which young persons are not to be employed within certain prohibited hours. Here, cotton is wound by machinery round strips of steel. For whatever purpose the manufacture of cotton is carried on, the place where it is carried on is a cotton-factory within the statute. Haydon, app., Taylor, resp., is precisely in point. The Court there held that winding cotton by means of machinery upon spools or reels, was a *winding* within the 3 & 4 W. 4, c. 103, as well as a "process" in the manufacture of cotton within the 7 & 8 Vict. c. 15. Is a fabric of cotton less a fabric of cotton because it is used in combination with something else? [ERLE, C. J.—For instance, the combination of a fabric of cotton with whalebone for the purpose of making stays.] Whether in combination with whalebone, or steel, or any other substance, can make no difference.

ERLE, C. J.—The question in this case has been, whether the premises of the respondent are, upon the facts stated, shown to be a factory wherein steam-power has been used to work any machinery employed in the manufacture, or in any process incidental to the

manufacture of cotton, either separately or mixed with any other material, or any fabric made thereof. I am of opinion that they are shown to be a factory within the meaning of the Acts. Two samples have been produced before us,—one, in which the cotton thread is wound round the strip of steel,—the other, a covering formed by the interlacing or plaiting of cotton as a covering for crinoline steel. It appears to me that this fabric composed in the way described in the case is a fabric made by the manufacture of cotton within the words
*254] of the statute. The case put by my Brother *Keating in the course of the argument, of a factory for making the material for covering the steel, seems to me to be decisive. Nobody could for a moment doubt that the premises would be used for a process in the manufacture of cotton. I cannot see that it ceases to be so because by the same process it is wound round the strips of steel. This is a cotton fabric, and steam-power is used in the making of it. The premises, therefore, are a factory within the Act, and the magistrates in my judgment came to a wrong conclusion.

Williams, J.—I am of the same opinion. I think the weaving or plaiting by machinery of cotton-thread in the manner shown by the second sample produced to us, is an employment of machinery in the manufacture of a cotton fabric within the 73d section of the 7 & 8 Vict. c. 15. It appears from the statement of facts in the case that the thread is woven by machinery into a fabric for covering crinoline steel. It is unnecessary to say whether the combined article falls within the description of "a manufacture of cotton mixed with any other material," because I think it is clear, that, when once it is made out that steam or other mechanical power is employed in the manufacture of any of the fabrics enumerated, it is unnecessary to show what becomes of it afterwards.

Willes, J.—I am of the same opinion. The article produced to us is a cotton fabric; and it is not the less a cotton fabric because it is intended to be used in combination with strips of steel for the purpose of making the article also produced to us,—crinoline steel. I am disposed to agree with Mr. *Quain* that this is not the manufacture of cotton mixed with any other material. But the combination of the
*255] cotton fabric with steel does not make it the less a cotton *manufacture. I therefore think the case falls within the obvious meaning of the Factory Acts.

Keating, J., concurred.

Erle, C. J.—The result will be that we send back the case to the justices with an intimation of our opinion that the respondent's premises are a factory within the meaning of the Acts. But we do not think it a case for costs. Rule accordingly.

LANGMEAD *v.* MAPLE. *Jan.* 18.

1. It is competent to the Court of Chancery,—notwithstanding the provisions in the Chancery Amendment and Regulation Acts of 1858 and 1862 (21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42),—in refusing an injunction, to reserve to the plaintiff the right of proceeding at law.

2. To a declaration for an injury to the plaintiff's reversion, by building upon and against certain walls of the plaintiff, the defendant pleaded that the plaintiff ought not to be permitted to implead him in respect of those causes of action, because, after their accrual, and after the passing of the Chancery Regulation Act, 1862, the plaintiff commenced his suit and filed his bill in Chancery against him, and impleaded him therein for the very same rights, claims, and causes of action as in the declaration alleged; and that such proceedings were thereupon had that the Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and that the said judgment and decree still remained in force:—Held, a good plea by way of estoppel.

3. The plaintiff replied that he ought to be permitted to implead the defendant in respect of the causes of action in the declaration alleged, because he said that the Court of Chancery, in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, and ordered his bill to be dismissed, without prejudice to such right:—Held, a good replication.

THE first count of the declaration stated that certain gardens, with the walls thereof, were respectively in the possession of certain persons respectively as tenants thereof respectively to the plaintiff, the reversion thereof then respectively and still belonging to the plaintiff, and that the defendant injured the *plaintiff's said reversion in [*256
the said walls and premises, by wrongfully building and erecting certain other walls and certain buildings and erections upon and against the said walls wherein the plaintiff had such reversionary estate and interest as aforesaid, and keeping and continuing the same so there erected and built, to wit, hitherto.

The second count stated that certain dwelling-houses, with the appurtenances, were respectively in the possession of certain persons respectively as tenants thereof respectively to the plaintiff, the reversion of and in the said dwelling-houses respectively then and still belonging to the plaintiff, in which said dwelling-houses respectively there of right were and still ought to be divers windows respectively through which the light and air of right ought to have entered, and still of right ought to enter into the said dwelling-houses respectively; yet that the defendant prevented and obstructed the light and air from entering through the said windows respectively into the said dwelling-houses respectively, by erecting certain walls and buildings near to the said windows respectively, and keeping and continuing the same so there erected and built, to wit, hitherto; whereby the said dwelling-houses were and are rendered dark, unwholesome, and of less value, and the plaintiff was and is injured in his reversionary estate therein.

The third count stated that the defendant broke and entered a certain wall of the plaintiff, being the southern boundary of certain houses and premises of the plaintiff, situate, &c., and erected and built upon and against the said wall a certain other wall and certain buildings and erections, and kept and continued the same so there erected and built, to wit, hitherto: and the plaintiff claimed 500*l.*, and a writ of injunction to restrain the defendant from the continu-

*257] ance and *repetition of the injuries above complained of, and the committal of other injuries of a like kind relating to the same properties and rights respectively.

The defendant pleaded,—first, not guilty, to the whole declaration.

Secondly,—to the first count,—that the said gardens, with the walls thereof, were not respectively in the possession of the tenants of the plaintiff, as alleged.

Thirdly,—to the first count,—that the reversion of the said walls and premises respectively did not belong to the plaintiff, as alleged.

Fourthly,—to the second count,—that the said dwelling-houses, with the appurtenances, were not respectively in the possession of the tenants of the plaintiff, as alleged.

Fifthly,—to the second count,—that the reversion of and in the said dwelling-houses respectively did not belong to the plaintiff, as alleged.

Sixthly,—to the second count,—that there was not nor was of right in the said dwelling-houses respectively, or any of them, the said windows respectively, or any of them, through which, the light and air ought to have entered, as alleged.

Seventhly,—to the third count,—that the said wall was not the plaintiff's, as alleged.

Eighthly,—to the first count,—that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said, that, after the accruing of the causes of action in the first count alleged, and after the passing of the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), the plaintiff commenced his suit and filed his bill in the High Court of Chancery against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the said first count alleged; *258] and such *proceedings were thereupon had in the said suit, that, before the commencement of this suit, the said Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and the said judgment and decree still remains in force.

The ninth plea (to the second count) and the tenth plea (to the third count) were similar to the eighth.

The plaintiff took and joined issue upon all the pleas.(a)—And, for a further replication to the eighth plea, the plaintiff said that he ought to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because he said that the said Court of Chancery, in dismissing the said bill of the plaintiff in the said eighth plea mentioned, reserved to the plaintiff the right of proceeding at law for the causes of action in the said first count alleged, and ordered the said bill to be dismissed, without prejudice to such right: and this the plaintiff was ready to verify, wherefore he prayed judgment that he ought to be permitted to implead the defendant in respect of the causes of action in the said first count alleged. And for a further replication as to the defendant's tenth plea, the plaintiff repeated the allegations contained in his further replication to the defendant's eighth plea, sub-

(a) The replication was not pleaded to the ninth plea, because the decision of the Court of Chancery reserved the plaintiff's right to try at law in respect only of the matters alleged in the first and third counts.

stituting the words "last count" for the words "first count," and the words "tenth plea" for the words "eighth plea."

The plaintiff also demurred to the eighth, ninth, and tenth pleas, the ground stated in the margin being, "that the decree of a court of equity cannot be pleaded at law by way of estoppel." Joinder.

*The defendant took and joined issue upon the second and third replications to the eighth and tenth pleas respectively, and also demurred to those replications. Joinder. [*259

Lush, Q. C. (with whom was *H. James*), for the plaintiff.(*a*)—The Chancery Regulation Act only requires the Court of Chancery to do what it was before in the habit of doing. The 25 & 26 Vict. c. 42, recites "that the High Court of Chancery has power in certain *cases to refuse or postpone the application of remedies, within its jurisdiction, until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of Her Majesty's Courts of common law; and that it was expedient that the said power should no longer exist, and that, in all such cases, every question of law and fact cognisable in a Court of common law, arising in the said Court of Chancery, in which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be determined by or before the said Court itself." The 1st section enacts, that, "in all cases in which any relief or remedy within the jurisdiction of the said Courts of Chancery respectively is or shall be sought in any cause or matter instituted or pending in either of the said Courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same Court." The 2d section provides, that, "whenever it shall appear to either of such Courts that any question of fact may be more conveniently tried by a jury at the Assizes, or at any sitting in London or Middlesex for the trial of causes in the superior Courts of common law, it [*260

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the Chancery Regulation Act, 1862, does not affect any legal remedies, but merely provides, that, in respect of any equitable relief or remedy sought in the Court of Chancery, that Court shall determine any question of law or fact upon which the right to such equitable relief or remedy may depend:

"2. That it is possible that the Court of Chancery may have determined in favour of the defendant on grounds which do not at all concern or negative the legal right of the plaintiff, or his right of action:

"3. That the determination in favour of the defendant may have been upon such grounds as are mentioned in the 4th section of the Act, viz. that such matter had been improperly brought into equity, and that the same ought to have been left to the sole determination of a Court of law:

"4. That it is not possible, consistently with the nature of the causes of action and the respective jurisdictions of the Court of Chancery and a Court of common law, that the plaintiff should have impleaded the defendant in Chancery for the very same rights, claims, and causes of action as alleged in the declaration, or that the Court of Chancery should have determined such causes of action in favour of the defendant:

"5. That, even if the defendant's pleas are primâ facie good, the replications demurred to are good, as virtually denying the defendant's pleas, and as showing that the Court of Chancery did not so determine the causes of action in favour of the defendant as to prevent the plaintiff from maintaining this action in respect of these causes of action."

shall be lawful for such Court, notwithstanding anything in this Act contained, to direct an issue to try any question of fact at the Assizes to be held in and for any county where the same may be conveniently tried, or at any such sitting for the trial of issues in London or Middlesex as aforesaid; and (subject to such general orders, if any, as may hereafter be made in relation thereto), the practice hitherto existing in such Court in *reference to the trial of issues shall prevail in reference to the trial of any issues directed under this proviso." The 3d section enacts that "all the provisions with reference to the trial of questions of fact by or before the High Court of Chancery, and by or before the Court of Chancery of the county palatine of Lancaster, which are contained in 'The Chancery Amendment Act, 1858' [21 & 22 Vict. c. 27], shall apply to the determination of questions of fact by or before the said Courts respectively under this Act." And the 4th section provides, "that, in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease, or mortgage (and whether mesne profits or damages shall or shall not also be sought in that suit), such relief only shall be given in equity as would have been proper according to the rules and practice of the Court if this Act had not been passed: and that nothing in this Act shall make it necessary for a Court of equity to grant relief in any suit concerning any matter as to which a Court of common law has concurrent jurisdiction, if it shall appear to the Court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a Court of common law." To raise an estoppel, it is necessary to show that the matter *did* come in issue in the former proceeding; it is not enough to show that it *might* come in issue. This is laid down in the notes to The Duchess of Kingston's Case, 2 Smith's Leading Cases, 5th edit. 669, where it is said: "It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends upon the question *whether the same point was in issue.* A verdict between two parties upon one question can, of course, *have no binding effect in an issue joined between them on another. (See Bull. N. P. 233.) Nor will the verdict be admissible, unless it appears clear that the same point actually *was* in issue. It is not sufficient that it *might have been so.*" The pleas here are not specific enough.

Rochefort Clark, contrà. (*a*)—The pleas are good, and the replications

*261]

*262]

(*a*) The points marked for argument on the part of the defendant were as follows:—

In support of the pleas,—"1. That the declaration only raises such questions of law and fact as are shown by the pleas to be the same as those submitted to the Court of Chancery for the determination of that Court at the instance of the plaintiff:

"2. That, by the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), extending the Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), that Court was not merely empowered, but absolutely bound, to inquire into and determine those facts, and also every question of law incident thereto; the same being questions of law and fact on which the plaintiff's title to relief depended:

"3. That the pleas show that the said Court did in due course determine those matters of law and fact in the defendant's favour:

"4. That the matters of law and fact attempted to be tried in this action, having already

bad. By the 2d section of the *Chancery Amendment Act, 1858 (21 & 22 Vict. c. 27), it was enacted, that, "in all cases [*263 in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it should be lawful for the same Court, if it should think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance; and such damages might be assessed as such Court should direct." The 3d section enacted that "it should be lawful for the Court of Chancery, if it should think fit, to cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried, by a special or common jury, before the Court itself;" and then it proceeded to describe the mode in which this was to be done. The 5th section enabled the Court of Chancery to assess the amount of such damages without a jury; and the 6th section empowered the Court to send the assessment of damages to a Court of law. By the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42), what the Court of Chancery was before empowered to do, is now made obligatory: Young *v.* Fernie, 33 Law J., Chan. 192. The subject-matter of this action having already been disposed of by a Court of competent and concurrent jurisdiction, the plaintiff cannot be permitted to re-agitate the matter in this Court. If an issue were directed by the Court of Chancery, and tried here, the Court would not *allow the same question to [*264 be tried again in an action commenced here. Why, then, should it be allowed if tried in the Court of Chancery? [ERLE, C. J.—To constitute a good plea of estoppel, the defendant must show that the same identical causes of action were tried in Chancery. That is, properly tried before a jury. *Lush.*—The Court of Chancery is not compelled to find damages.] Assuming the pleas to be good, the replications are clearly bad. They allege that the Court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law for the causes of action in the first and third counts alleged, and ordered the said bill to be dismissed, without prejudice to such right. As a matter of fact the Court of Chancery did not, and as a matter of law it could not, do as alleged. [WILLES, J.—You must make out that the Court of Chancery had exclusive seisin of the matter.] In Young *v.* Fernie, Vice-Chancellor Stuart had directed an issue to try the validity of a patent by a jury at common law.

been so determined by the Court of Chancery, the plaintiff is estopped from trying the same matters of law and fact over again in this action."

In support of the demurrers to the replication to the eighth and tenth pleas,—"1. That the plaintiff does not by his replication deny that the questions of law and fact attempted to be raised in this action have been already tried and determined by the Court of Chancery at his instance, as shown by the eighth and tenth pleas; nor does he allege that his bill was dismissed on any other ground than that the Court of Chancery determined the question of law and fact in favour of the defendant; but merely shows, that, although that Court determined those questions in favour of the defendant, yet that Court affected to reserve to the plaintiff the right to proceed at law:

"2. That the Court of equity, having once determined the questions of law and fact as aforesaid, could not give any power or right to the plaintiff to try the same question over again in this action."

On appeal, Lord Westbury, C., reversed his decision, saying,—"The statute laid down the rule, that, for the future, these things should be heard and determined in this Court; and the proviso in the 2d section was introduced by way of exception to the rule; and, in order to bring a case within that proviso, the Court must be satisfied that the administration of justice would be more conveniently arrived at by directing an issue. His Lordship did not think anything could be more inconvenient than that, where there were mixed questions of law and equity, there should be an attempt to cut such cases in half, and send one half to be tried by a jury, reserving the other to be dealt with in this Court; and it was impossible that any satisfactory conclusion could be arrived at by that mode of investigating the case, though there would be a great expenditure both of time and money." *Here, the pleas allege distinctly that the plaintiff impleaded the defendant in Chancery for the very same rights, claims, and causes of action as in the declaration alleged, and that such proceedings were thereupon had in the said suit, that, before the commencement of this suit, the Court of Chancery *determined* the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant. And the replication does not deny that, but merely states that the plaintiff's bill was dismissed, without prejudice to the right of the plaintiff to proceed at law for the causes of action in the declaration alleged. The decision of the Court of Chancery, it is submitted, is a complete bar, and the subsequent permission to try at law amounts to nothing more than saying, that, if the plaintiff has a right at law, that Court would not by injunction restrain him from pursuing it.

*265]

ERLE, C. J.—I have already intimated my opinion that the pleas are good. I am also of opinion that the replications are good. The declaration complains that the defendant has injured the reversion of the plaintiff in certain walls and premises, by wrongfully building and erecting certain other walls and certain buildings and erections upon and against the same. The second plea is, that the plaintiff ought not to be permitted to implead the defendant in respect of the causes of action in the first count alleged, because the defendant said, that, after the accruing of the causes of action in the first count alleged, and after the passing of the Chancery Regulation Act, 1862 (known familiarly as Mr. Rolt's Act), the plaintiff commenced his suit and filed his bill in Chancery against the defendant, and impleaded the defendant therein for the very same rights, claims, and causes of action as in the first count alleged; and *that such proceedings were thereupon had in the said suit, that, before the commencement of this suit, the Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and that the said judgment and decree still remains in force. Upon a traverse of that plea, the defendant would have to show that there was a final judgment in the Court of Chancery upon these very causes of action. Upon demurrer, therefore, we may assume that the plea would be an answer to the action. Then comes the replication, in which the plaintiff says that he ought to be permitted to implead the defendant in respect of the causes of action in the first

*266]

count alleged, because he says that the Court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law for the causes of action in the first count alleged, and ordered the bill to be dismissed, without prejudice to such right. Upon demurrer to that replication, I am of opinion that it is a valid replication. It does substantially traverse the main point of the plea, viz., that there was a final adjudication upon the matters complained of by the plaintiff in his first count. The defendant alleges that the plaintiff sought relief in equity in respect of the causes of action declared on, and that his bill was dismissed. The plaintiff says that this dismissal was not a final adjudication upon the matters in issue, but a mere ad interim adjudication, reserving leave to him to try the question at law. On the part of the defendant, it is now contended that the effect of Sir Hugh Cairns's Act (21 & 22 Vict. c. 27), and Mr. Rolt's Act. (25 & 26 Vict. c. 42), is, to make this a bad replication; and that the decision of the Court of Chancery must be taken to have been a final determination of the matter, just as if it had been the judgment of a Court of *law upon the same question. But I take the judgment of the Lords Justices in Swaine *v.* The Great Northern Railway Company, 33 Law J., Chan. 399 to be a direct adjudication to the contrary of Mr. *Clarke's* argument. There, Swaine possessed a house and premises within about eighty feet of a station of the Great Northern Railway Company. Previous to 1859, there had been but one siding at the place, and it was on the opposite side of the line from the property of Swaine. In 1859, the Company constructed a second siding, on the side of the line nearest to the property of Swaine, and used it for carrying from London manure of an offensive description. Swaine remonstrated from time to time; but, in 1862, finding the nuisance greatly increased, in the month of May he made a formal complaint. Obtaining no redress, he, after a demand by his solicitors, filed, in January, 1863, his bill for an injunction, and for an inquiry as to damages. One of the Vice-Chancellors considered that the plaintiff, having had ample time to establish his right at law, and having failed to do so, was not entitled to file a bill for an injunction, and dismissed the bill. On appeal, the Lord Justices held that there had not been a nuisance so continuous and systematic as to justify the grant of the injunction, and they agreed to the dismissal of the bill,—*but without prejudice to the plaintiff's right to an action.* A question was then raised as to whether it was not the duty of the Court to go on and to decide whether or not the plaintiff was entitled to damages at law: and upon this Lord Justice Turner said: "Upon the question of damages, the Court had recently to consider it when Johnson *v.* Wyatt, 33 Law J., Chan. 394, the case of the photographic studio, was argued on appeal: but the Court must consider it again upon the present appeal. The law, he thought, stood thus:—According to Sir Hugh *Cairns's Act, the Court had jurisdiction to give damages in a case where the bill was properly filed in this Court; but, under Mr. Rolt's Act, it was not compulsory for the Court to exercise that jurisdiction. The Court had the power, therefore, but was under no compulsion. Then, looking at the nature of the case, it was, in his judgment, not one in which the Court would be well advised in going into the question of damages. He thought

[*267

[*268

that the bill must be dismissed, as the bill in Johnson *v.* Wyatt had been dismissed, though not exactly upon the same grounds, for there the Court was of opinion that the plaintiffs were not entitled to any damages at all. That was by no means said here: but their Lordships thought that the case could be more effectually disposed of by a Court of law than in a Court of equity. It was perhaps somewhat unfortunate that Mr. Rolt's Act had placed the Court in the position of being compelled to determine questions of fact upon the very insufficient statements of affidavits, or else by a vivâ voce examination of all the witnesses before itself. Upon the whole, the bill must be dismissed; *but it would be expressly without prejudice to the right of the plaintiff to bring any action he might be advised to bring, for, without that declaration, it might perhaps be thought that the Court had by the dismissal of the bill concluded the question of damages, as it had the power to do.*" That is a solemn adjudication directly on the point, and entirely satisfies my mind. In Johnson *v.* Wyatt the bill prayed an injunction and damages for an alleged nuisance. The bill was dismissed; and, upon the question of damages, Lord Justice Turner said: "Upon the best consideration which I have been able to give to the Chancery Regulation Act, 1862 (25 & 26 Vict. c. 42, Mr. Rolt's Act), I am not satisfied, that, under the provisions of that Act, we are
*269] *absolutely bound* to enter *into this part of the case; for, I much doubt whether the question as to the plaintiff's right to damages ought to be considered as being, within the meaning of the Act, a question of law or fact cognisable in a Court of common law, on which the plaintiff's title to relief in equity depends: but Sir Hugh Cairns's Act (21 & 22 Vict. c. 27) has, I think, given us jurisdiction to entertain this question of damages; and, having regard to the spirit and intention of the later Act (the Chancery Regulation Act), I think that, having this jurisdiction, we ought under the circumstances of this case to exercise it. I have, therefore, considered the question of damages, and looked into several cases at law on the subject,—Back *v.* Stacey, 2 Car. & P. 465 (E. C. L. R. vol. 12), Parker *v.* Smith, 5 Car. & P. 438 (E. C. L. R. vol. 24), Pringle *v.* Wernham, 7 Car. & P. 377 (E. C. L. R. vol. 32), and Wells *v* Ody, 7 Car. & P. 410. Upon the authority of those cases, my opinion is that the plaintiffs have not established a sufficient case to entitle them to any damages, and that their case fails upon this point also." The Court, therefore, assume the jurisdiction, and finally decide the question of damages. These two cases seem to me to be directly in point. Upon their authority, therefore, as well as upon the construction of the statutes, and the reason of the thing, I am clearly of opinion that this replication is good.

WILLIAMS, J.—I am of the same opinion. If the plea had stood altogether unanswered by the replication, it seems to me that it would have been a good plea, because it avers that the Court of Chancery in the former suit determined in favour of the defendant in respect of the causes of action alleged in this declaration. The cases to which my Lord has referred show that the Court of Chancery might have done that if they had pleased, but that it was in their discretion either
*270] to *determine the matter finally themselves or to send it to a Court of law for adjudication. But then comes the replication,

which shows that the allegation in the plea is not well founded, and is not to be taken to be true. It states that the Court of Chancery, in dismissing the plaintiff's bill, reserved to him the right of proceeding at law, and ordered the bill to be dismissed, without prejudice to such right. It therefore appears from that that the Court of Chancery did not exercise the jurisdiction they might have done by finally dismissing the bill, but thought fit to reserve to the plaintiff the right to try the question at law. I therefore think the replication is a good answer to the plea.

WILLES, J.—I am of the same opinion. I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction, the plaintiff has lost his right to put it in suit either before that or any other Court. The conditions for the exclusion of jurisdiction on the ground of res judicata, are, that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided. The question arising in one respect on the pleas in this case, and in another on the replications, is, whether these conditions for the exclusion of the jurisdiction of this Court are existing here. Assuming it to be true, as we must for the purpose of this argument, that the Court of Chancery had jurisdiction in the matter conferred upon it by Sir Hugh Cairns's Act and Mr. Rolt's Act, and that it was bound to exercise that jurisdiction, was the same matter in issue before that Court? Different considerations arise upon the pleas and upon the replications. I was at first disposed to think the pleas bad. It is not sufficient to constitute res judicata that the matter has *been determined on: it must appear that it was contro- [*271
verted as well as determined upon. Looking at the pleas, it seemed to me that probably the Court of Chancery may not have dismissed the plaintiff's bill on the merits, but, judging upon equitable grounds, may have considered it not to be a case for an injunction, and may have declined to go into the question whether the plaintiff had any legal right or not. It may have been unnecessary to go into that, except for the amount of damages. Therefore the Court of Chancery may have given the go-by to the right now asserted by the plaintiff. But, as the plea alleges that the Court of Chancery determined the same alleged causes of action, I think we are bound to assume it to mean that the Court decided upon the legal merits, against any right of action in the plaintiff in respect of those causes; and, as that Court had jurisdiction, it might have made a final end of the matter. I can quite conceive that the first view may be the proper one to take on the evidence given. It may appear that the decree was upon the face of it final, and, either on the face of the decree, or on the evidence (if admissible), that the dismissal of the plaintiff's bill proceeded upon grounds peculiar to the Court of Chancery, and that this matter was not disposed of. But, on looking at the plea, for the reasons mentioned, I think I must assume that the Court of Chancery did dispose of the legal merits, and that the plaintiff has no right to ask this Court to come to a different decision on the same matter. So far as to the pleas. The aspect of the case, however, is changed when we introduce the replication, viz. that the

said Court of Chancery, in dismissing the plaintiff's bill in the eighth plea mentioned, reserved to the plaintiff the right of proceeding at law, for the causes of action in the first count alleged, and ordered
*272] the bill to be dismissed, without prejudice to such right; *because it is clear not only that the matter may or may not have been controverted, but the third condition of a plea of res judicata is not complied with, viz. that there must have been a final adjudication. For these reasons, I am of opinion that there should be judgment for the defendant on the demurrer to the pleas, and for the plaintiff on the demurrer to the replications.

KEATING, J.—I am entirely of the same opinion. The strength of Mr. *Clarke's* argument has been upon the 25 & 26 Vict. c. 42, which he contends precludes the Court of Chancery from doing what it did. The cases, however, which my Lord has cited, show that the Court of Chancery had power to do what the replication alleges that it did. If so, the replication is a good answer to the pleas.

Judgment for defendant on the demurrer to the pleas, for plaintiff on the demurrer to the replications.

KILLBY *v.* WRIGHT. *Jan.* 18.

A deed of composition made between "the several persons whose names were subscribed and seals affixed in the schedule (being creditors of T. H. W., of the first part, and T. H. W. of the second part)," recited that the debtor was indebted to the said several persons parties thereto of the first part, in the sums set opposite their respective names, and had agreed to pay a composition of 6*s.* in the pound,—"such payment or composition to be made and paid to all and every the creditors of the said debtor *upon their the said creditors executing this deed*,"—and witnessed, that, in consideration of the payment by the debtor *to the said several creditors* of such composition as aforesaid, the parties of the first part released the debtor:—

Held, a void deed, as excluding non-assenting creditors from all benefits under it, notwithstanding all the formalities prescribed by s. 192 of the Bankruptcy Act, 1861, had been duly observed.

THIS was an action by payee against acceptor of a bill of exchange for 150*l.* drawn by one Theodore Anthony Rochussen on the 25th of March, 1863, at twelve months' date; and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defend-
*273] ant, for money paid by the plaintiff for the defendant *at his request, for money received by the defendant for the use of the plaintiff, for interest upon money due from the defendant to the plaintiff and forborne at interest by the plaintiff to the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated between them. Claim, 200*l.*

Plea,—that, after the accruing of the cause of action, and after the Bankruptcy Act, 1861, took effect, an indenture was made in the words following, that is to say:—"This indenture, made the 14th of May, 1864, between the several persons whose names are subscribed and seals affixed in the schedule hereunder written (being respectively either individually or in copartnership with others creditors of Thomas Harby Wright, on behalf of themselves and all and every other the creditors of the said T. H. Wright, of the first part, and T. H. Wright, of, &c., tobacconist and wine-merchant, hereinafter

called 'the said debtor,' of the second part: Whereas, the said debtor is indebted to the said several persons parties hereto of the first part in the several sums of money set opposite their respective names in the said schedule hereunder written, and, being unable to discharge the same in full, hath agreed to pay a composition of 6*s.* in the pound, *such payment or composition to be made and paid to all and every the creditors of the said debtor, upon their the said creditors executing this deed*, and to be in full discharge of all and every the debts of the said debtor due and owing at the time of the execution of these presents: Now, this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the payment by the said debtor to *the said several creditors* of such composition as aforesaid, they the said several persons parties hereto of the first part, for themselves and their several and respective partners, *do hereby accept the said composition in full satisfaction and discharge [*274 of their respective debts, and do by these presents release and for ever quit claim unto the said debtor, his heirs, executors, and administrators, all and all manner of action and actions, suit and suits, debts and sums of money, accounts, costs, reckonings, agreements, judgments, extents, executions, claims, and demands whatsoever, which they the said several parties hereto of the first part and their several and respective partners now have, or at any time heretofore had, against the said debtor. In witness," &c.: Averment, that the said deed was valid, effectual, and binding on all the creditors of the defendant, including the plaintiff, as if they were parties and had executed the same; and that the conditions of the Bankruptcy Act, 1861, had been observed; that a majority in number and three-fourths in value of the creditors had in writing approved of and assented to the said deed; that the deed was duly attested and stamped, and registered, with the affidavit required by the said Bankruptcy Act; that a certificate of registration was given to the defendant; that the plaintiff was a creditor, and had notice of the deed, and was requested to execute the same; and that the defendant, by means of the premises, was released and discharged from the cause of action in the commencement of this plea set out.

To this plea the plaintiff demurred; the ground of demurrer stated in the margin being, "that it does not appear that the plaintiff did or could execute the said deed; and that it is not a deed for the composition of all the defendant's debts and liabilities, and his release therefrom, but only of the debts due to the creditors parties to the deed." Joinder.

Laxton, in support of the demurrer.—The deed set out in the plea is clearly bad: it does not place the *executing and non-assenting creditors upon the same footing: and it precludes the [*275 plaintiff from obtaining any benefit under it unless he executes it. This is clear from two recent cases in the Exchequer Chamber, of Benham *v.* Broadhurst, 11 Law Times (N. S.) 537, and Raphael *v.* Davis, 11 Law Times (N. S.) 539. In Benham *v.* Broadhurst, a composition-deed was made between a debtor of the one part, and the several persons creditors who were parties thereto of the other part; and the debtor thereby covenanted with the said several persons parties thereto of the second part respectively to pay them the com-

position therein mentioned: the deed was executed by the requisite majority in number and value of the creditors, according to the 192d section of the Bankruptcy Act, 1861: and it was held void as against a non-assenting creditor. Crompton, J., in giving judgment, said: "The present deed, it will be observed, is made between the debtor and the assenting creditors only, the non-assenting creditors being no parties to the deed: but the assenting creditors take a covenant to themselves respectively and individually, and there is no covenant by this debtor with the non-assenting creditors, or some trustee for them, on which they or the trustee can sue. *They have not equal protection.*" In Raphael *v.* Davis, the plea alleged, that, after the accruing of the cause of action, and after the Bankruptcy Act, 1861, to wit, on, &c., by indenture between the defendant of the first part, J. C. and M. C., trustees on behalf of themselves and others the undersigned creditors of the defendant, of the second part, and the several other persons, creditors of the defendant, whose names were thereunder signed, of the third part, the defendant assigned to the said trustees all his estate, &c., upon trust out of the proceeds to pay to the several per-
*276] sons parties thereto of the third part a composition *of 2*s.* 6*d.* in the pound upon the amount of their respective debts; in consideration whereof the said parties thereto of the third part released the defendant, his executors, &c., from their said respective debts: and it was declared that the said deed should not be binding upon any creditor party thereto to whom the amount of the said composition should not be paid within seven days from the time of such creditor executing the deed,—with the usual averments that the deed was a trust-deed under s. 192 of the Bankruptcy Act, 1861, and duly executed by the requisite majority, &c., and that the plaintiff was a creditor, &c.: it was held that the deed was bad, inasmuch as, upon the fact of it, it excluded non-assenting creditors from getting any benefit under it. Blackburn, J., characterized the deed as "the worst deed he ever saw." And Mellor, J., added,—"It carefully excludes the possibility of a non-assenting creditor getting any benefit under it." Dingwall *v.* Edwards, 33 Law J., Q. B. 161, is also a distinct authority to show that a deed which excludes from its benefits non-executing creditors is void. Cockburn, C. J., there says: "It is not disputed, that, in order that creditors not executing a composition-deed shall be bound under the 192d section of the Bankrupt Act, they must be entitled to the same benefit under it as is secured by it to the creditors executing it. If by the terms of the deed creditors are excluded except on the condition of executing it, the deed will not be binding on those who do not execute it. While we should desire to give effect to the intention of the Legislature by upholding composition-deeds to which the proportion of the creditors required by the statute have been parties, we must take care not to enable an insufficient number of creditors to obtain unduly the execution of reluctant creditors, by the apprehension of the latter that they may
*277] *be placed at a disadvantage by omitting to execute." And Crompton, J., says: "It was conceded in the argument in this case, that the deed of arrangement under the arrangement clauses of the last Bankrupt Act was invalid, and no bar to the plaintiffs' action, if, as contended by the plaintiffs' counsel, its construction was, that

the composition was only to be paid to the creditors who should actually sign the deed, or if, which is the same thing, it imposed on the non-assenting creditors the condition of signing before or when they received the composition. As it is now to be taken as decided that a composition-deed is within the Act, without any assignment of any property of the debtor, it seems still more necessary to see that a provision is made for the non-assenting creditors having their share of the composition, as there is no trust-fund in such case which can be administered either under the deed or under the 197th section of the last Bankrupt Act. If the provision for the payment of the composition is to stand in the same position as the trust for the administration of the property, it clearly must not exclude the class of non-assenting creditors."

Watkin Williams, contrà, admitted that, if Dingwall *v.* Edwards, 33 Law J., Q. B. 161, was in point, he could urge nothing in support of the present deed.

ERLE, C. J.—It seems to me that the case of Dingwall *v.* Edwards is decisively in point.

The rest of the Court concurring, Judgment for the plaintiff.

---

*CLARKE, Assignee of the Estate and Effects of FRANCIS AYERS, a Bankrupt, and Others, *v.* WATSON and Another. *Jan.* 25. [*278

By the terms of a contract certain works were to be done for the defendants by the plaintiffs according to certain plans and specifications, and to be paid for by certain instalments "on production by the contractors to the defendants, or one of them, of the certificate of W. L. or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such work to his satisfaction."

In an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs to entitle them to have the certificate of the surveyor that the work had been duly and efficiently performed and completed to his satisfaction, but that the said surveyor had not given such certificate, but *had wrongfully and improperly neglected and refused so to do*, &c.,—Held, on demurrer, that, in the absence of collusion, the plaintiffs were not entitled to recover, without producing the surveyor's certificate, nor were the defendants responsible for the refusal of the surveyor to give one.

THE first count of the declaration stated, that, theretofore, and before the said Francis Ayers became bankrupt, to wit, on the 9th of October, 1862, by an agreement in writing then made and entered into between the said Francis Ayers, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned, in conformity with certain plans, drawings, and sections therein mentioned, and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for 312*l.* 15*s.*, to be paid as follows, 156*l.* 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they the contractors had duly and efficiently performed and completed

such portion of the work as according to the judgment of the said surveyor should be not less than three fourth parts thereof in extent and value; 78*l.* 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid that the whole of the works mentioned and referred to in
*279] the said plans, *drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for the time being of the local board of health, if necessary; and the balance of 78*l.* 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion; provided the therein-mentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair, and in perfect and sound condition in all respects,—it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion, by and at the sole cost and expense of the said contractors: and the defendants thereby agreed with the said Francis Ayers, William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of 312*l.* 15*s.* at the time and in the manner thereinbefore mentioned: Averment, that, although 156*l.* 7*s.* 6*d.*, part of the said sum of 312*l.* 15*s.*, had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants that the whole of the works in the said plans, drawings, and specifications, had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them: yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of 78*l.* 3*s.* 9*d.* payable on such certificate: and that, although more than four months since the said surveyor ought to have given such certificate had elapsed,
*280] and although all things *had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of 78*l.* 3*s.* 9*d.*

The defendants demurred to this count; and the plaintiffs joined in demurrer.

Henry James, in support of the demurrer.(*a*)—Two breaches are alleged in the declaration. The first is, that the defendants have not paid the 78*l.* 3*s.* 9*d.* The answer to that is, that, by the terms of the contract, it was payable only upon production of the surveyor's cer-

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That the first count discloses no cause of action against the defendants:

"2. That the plaintiffs are not entitled to recover, without obtaining the several certificates of the surveyor:

"3. That the defendants are not liable for the surveyor not giving such certificates; and that, in the absence of such certificates, no breach of the agreement is shown."

tificate, which has not been produced. The second breach is, that the surveyor has wrongfully and improperly withheld his certificate. No fraud, however, or collusion, is charged. It is not even alleged that the conduct of the surveyor was fraudulent: the allegation that he wrongfully and improperly neglected and refused to grant his certificate, would be satisfied by showing that he had been guilty of a mere error in judgment. Scott *v.* The Corporation of Liverpool, 1 Giffard 216, is precisely in point. That was a bill for an account of certain works constructed by Scott for *the Corporation of Liverpool,— [*281
the contract providing, that, "if the contractors should fail in performing their contract, or, in the opinion of the engineer, not make due progress, it should be lawful for the corporation to seize the plant, and, in case any dispute should arise, the decision of the engineers should be final at law and in equity." The case was heard before Vice-Chancellor Stuart, assisted by Erle, J., and the bill was dismissed with costs, no case of fraud, misconduct, incapacity, or refusal to act being established against the engineer. In delivering his opinion there, Erle, J., says: "By the contract it appears to me that the engineer is interposed between the corporation and the contractors, and made the absolute judge of the performance of the works, and that there is no right in the contractors to demand payment, and no liability on the Company to pay, throughout the contract, unless the condition of obtaining a valuation by the engineer, and his certificate, has been fulfilled." "The law can only enforce rights under a contract according to that contract. It is not necessary to cite authorities on such a subject. I refer only to some of those cited in the argument. In Grafton *v.* The Eastern Counties Railway Company, 8 Exch. 699,† the contract was, to deliver to the satisfaction of the agent of the defendants. It was held that the promise was on condition that the agent was satisfied, and that no action lay for the price of coke, unless the condition was fulfilled. So, in Milner *v.* Field, 5 Exch. 829,† the same point prevailed. In Ranger *v.* The Great Western Railway Company, 5 House of Lords Cases 72, the stipulation that the engineer should be the absolute judge during the progress of the works of the mode in which the contractor was discharging his duties, was recognised as both valid and reasonable, though the engineer was a shareholder in the Company: and in *pp. 106, 107, [*282
of the report, the notion that accounts of the work done under a similar contract to this might be taken by the Master in Chancery, instead of the engineer, on the ground that the contract has been abandoned, was repudiated as erroneous. The stipulation is of great importance, for, if the contractors can open this contract on account of alterations and additions with mutual disputes, and can insist that an account should now be taken before a stranger of the entire works, which can ill be examined after complete, they may inflict litigation, complicated, expensive, and doubtful in the extreme,—an evil which the stipulation is framed to avert. The question remains, whether the conduct of the parties affords any evidence of a right of action, either on the ground of waiving the conditions, or departing from the original contract, and substituting another, either expressed or implied, or on the ground of a wrong. My answer is in the negative. I am not aware that the defendants are shown to have committed any wrong,

or any breach of their contract, or any departure from it." "I cannot discover that the corporation have by their conduct created a liability at law not imposed on them by the terms of the contract." And Vice-Chancellor Stuart, at p. 228, says,—"This Court has no right or power to impose upon either of the parties to the contract any other terms than those which have been prescribed by themselves, and by which they have agreed to be bound. It is the very essence of the contract, that no sum should be considered due and owing to the plaintiffs on account of any of the works executed by them, unless the engineer shall certify the amounts."

*283] *Parry*, Sejt., contrà.(*a*)—Substantially, this is an *action for a tort. The plaintiff complains of a wrong done by the agent of the defendants. Lambert was not acting for the plaintiffs, but for the defendants alone, to protect them against overcharges by the contractors. The contract in effect is, that the defendants will employ Lambert, "or other their surveyor for the time," to perform the duties of surveyor rightfully and honestly; and the defendants are responsible if the person so employed shall wrongfully or improperly withhold his certificate. [WILLES, J.—The declaration states that the work was done to the satisfaction of the surveyor.] Yes. In Pawley *v.* Turnbull, 7 Jurist, N. S. 792, Vice-Chancellor Stuart held the conduct of the architect in withholding certificates to amount to improper conduct, and decreed payment of the money notwithstanding their absence. The defendants must be held to have dispensed with the condition of an engineer's or surveyor's certificate, if they appoint a man who wrongfully abstains from acting. [WILLES, J., referred to Harrison *v.* The Great Northern Railway Company, 11 C. B. 815 (E. C. L. R. vol. 73), and The Great Northern Railway Company *v.* Harrison, 12 C. B. 576 (E. C. L. R. vol. 74).] In Milner *v.* Field, 5 Exch. 829,† there were negative words in the contract: the proviso was, that "no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the defendant, that the works were performed according to the specifica-

*284] tions." Batterbury *v.* Vyse, 2 Hurlst. *& Colt. 42,† is in reality an authority for the plaintiff, though the declaration alleged that the surveyor, in neglecting to certify, acted in collusion with the defendant and by his procurement. The point marked for argument on the part of the plaintiff there was, "that the defendant who employs the architect does contract with the plaintiff that he will do his duty and act fairly."

James was not called upon to reply.

ERLE, C. J.—I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of William Lambert or other the surveyor for the time of the defendants. Many

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the surveyor is the agent of the defendants; and they are bound to employ him to certify according to the said agreement:

"2. That the surveyor is responsible to the defendants for improperly certifying or omitting to certify; and they are responsible to the plaintiffs:

"3. That the wrongful refusal of the defendants' agent to certify, is a dispensation of the condition precedent, and equivalent to the defendants' preventing the certificate being granted."

contracts are so made. Every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important in a case of this description that the person for whom the work has been done, should not be called upon to pay for it until some competent person shall have certified that the work has been properly done according to the contract and specification. Here, the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his *satisfaction, and that the said surveyor had [*285
"wrongfully and improperly" neglected and refused so to do. That in my opinion is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate anything of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiff to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not in my judgment such as to entitle them to succeed.

WILLIAMS, J.—I am of the same opinion. Notwithstanding the surveyor may have been wrong in withholding his certificate, the money is not due.

WILLES, J.—I am of the same opinion. Consistently with the allegations in this declaration, the only wrong the surveyor has been guilty of may be an error in judgment; or he may have refused to exercise any judgment; in which case, the proper course would have been to call upon the defendants to appoint some other surveyor who will do his duty.

KEATING, J., concurred. Judgment for the defendants.

---

*FESSARD *v.* MUGNIER. *Jan.* 23. [*286

1. The plaintiff declared upon a bill drawn by him in Paris upon and accepted by the defendant.

The defendant pleaded a deed of composition under the Bankruptcy Act, 1861, whereby, in consideration of 5*s.* in the pound to be paid to them by him on the 8th of May, 1863, they released him from their several claims, saving their rights upon securities held by them. The plea contained an averment "that the defendant had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5*s.* in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition," and also an averment, "that, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto, and had duly executed the same."

Replication, that the defendant made default in payment of the composition on the said 8th of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days after that day, and still remained unpaid, and never had been paid or tendered to the plaintiff.

Rejoinder, that the plaintiff was not on and during the said 8th of May, and for the space of fourteen days next after that day, within the realm of England.

Surrejoinder, that the plaintiff was a native of France, and had always resided and carried on his business there, that the contract declared on was made in France, that the plaintiff was not in England at the time of the making of the deed, and that he had not notice of the making thereof at the time of the making or on the said 8th of May, or within fourteen days after that day:—

Held, on demurrer to the plea and surrejoinder respectively, that the absence of an averment of payment or tender of the composition at the time named in the deed, was not cured by the averment of readiness and willingness, notwithstanding the plaintiff's absence from England; and that the general averment of performance at the end of the plea did not help.

2. Absence of the creditor from England affords an excuse for the want of an averment of tender or payment by the debtor only where the former has gone abroad after the making of the contract.

THE first count in the declaration stated that the plaintiff, on the 1st of August, 1862, by his foreign bill of exchange, made at Paris, in the empire of France, now overdue, directed to the defendant, required the defendant to pay to the plaintiff 27*l.* 10*s.* three months after date; and the defendant accepted the said bill, but did not pay the same.

There was also a count for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for interest upon and for the forbearance at interest by the plaintiff to the defendant, at the defendant's request, of moneys owing from the defendant to the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them. Claim, 35*l.*

Second plea,—that, after the accrual of the plaintiff's claim in the declaration mentioned, and before *this action, the defendant became and was adjudicated to be bankrupt within the meaning of the statute in force concerning bankrupts; and that, at the first meeting of creditors duly held after such adjudication, three-fourths in number and value of such creditors present and represented at such meeting duly resolved that a proposal of the defendant then and there made to pay a composition of 5*s.* in the pound on the 8th day of May, 1863, in discharge of his creditor's claims, should be accepted, and that the estate of the said defendant ought to be wound up under a deed of composition in the terms of the said proposal, and that an application should be made by the defendant to the Court to stay the proceedings in the said bankruptcy until the said 8th day of the said last-mentioned month of May at 11 o'clock in the forenoon precisely; that the registrar of the said Court of Bankruptcy did duly report such resolution to the said Court, and such Court did afterwards, on the 11th of April, in the year last aforesaid, after finding that the said resolution had been duly carried, and that its terms were reasonable and calculated to benefit the general body of the creditors under the said estate, confirm the said resolution, and make order accordingly, and also that all further proceedings in the defendant's said bankruptcy should be and the same were thereby stayed and suspended for one month from the said last-mentioned day; that he the defendant, afterwards duly produced to the said Court for its consideration

*287]

a deed of composition signed by and on behalf of three-fourths in number and value of all his said creditors, and which said deed, with a schedule thereto, was in the words and figures following, that is to say,—"This indenture, made the 2d day of April, 1863, Between James Julius Mugnier, of 10, Westbourne Grove, Bayswater, in the county of Middlesex, watch and clock-maker, a bankrupt, of the *one part, and the several persons whose names and seals are hereunto subscribed and set, and all other persons who at the [*288 date hereof are respectively creditors of the said James Julius Mugnier, a bankrupt, of the other part: Whereas the said James Julius Mugnier was on the 19th of March last duly adjudged a bankrupt: and whereas the estate of the said James Julius Mugnier is not sufficient to pay the debts and liabilities in full: and whereas the said James Julius Mugnier has proposed to pay his creditors a composition of 5*s.* in the pound on the amount of their respective debts, to be paid on the 8th day of May next, and three-fourths in number and value of the creditors of the said James Julius Mugnier have agreed to accept the said proposal and to execute the release hereinafter contained, and have agreed to sign a resolution to be passed at a meeting of creditors of the said James Julius Mugnier that the estate of the said James Julius Mugnier ought to be wound up under a deed of composition, and to consent to an application to the Court of Bankruptcy to stay all further proceedings under the said adjudication: Now this indenture witnesseth, that, in consideration of the release hereinafter contained, he the said James Julius Mugnier doth hereby, for himself, his heirs, executors, and administrators, covenant with the parties hereto of the second part, and each and every of them, their and each and every of their heirs, executors, and administrators, that he the said James Julius Mugnier will on or before the 8th day of May next pay unto each and every of them the said parties hereto of the second part a composition of 5*s.* in the pound on the amount and in full discharge of their respective debts and claims: And this indenture also witnesseth, that in consideration of the said covenant, they the said several creditors parties hereto of the second part, do, and each and *every of them doth by these [*289 presents, acquit, release, and for ever discharge the said James Julius Mugnier, his executors and administrators, and his estate and effects, of and from all actions, suits, claims, and demands whatsoever, which the said parties hereto of the second part, or either of them, now have against the said James Julius Mugnier: Provided always, and it is hereby agreed and declared, that these presents shall not extend to invalidate, prejudice, or in any manner affect any mortgages, charges, or other securities or liens which any of the said parties hereto of the second part may have upon any of the real or personal estate of the said James Julius Mugnier, or any bonds, bills, notes, or other securities given or payable by any other person by way of security for any debt due and owing by the said James Julius Mugnier to either of the said parties hereto of the second part; but that all such several mortgages, charges, securities, liens, and also all such bonds, bills, notes, and other securities from third parties, shall be and continue available in the hands of the several creditors parties hereto holding the same, in the same manner to all intents and purposes as if these presents had not been made: Provided always, that, if the said James

Julius Mugnier shall make default in payment of the said composition on the said 8th day of May next, and such composition shall remain unpaid for the space of fourteen days next after that day, the release hereinbefore contained shall be void and of none effect. In witness," &c. [Then followed the schedule of creditors with the amount of their respective debts.] Averment, that the said Court of Bankruptcy, after the said production and after the reading of the said deed, and after hearing the defendant, and upon reading the affidavit of the defendant verifying the execution thereof, duly con-
*290] sidered the said deed, and, being satisfied that it *had been duly entered into and executed, and that its terms were reasonable and calculated to benefit the general body of creditors under the said estate, did order and declare that such deed had been completely executed, and also directed that the same be, and it was thereupon, registered with the chief registrar of the said Court of Bankruptcy: That all the matters aforesaid happened before this suit, and that, before and at the time of the happening thereof, the plaintiff was a creditor of the defendant in respect of the sums of money and causes of action herein pleaded to, within the meaning of the Bankruptcy Act, 1861: *And that he, the defendant, had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5s. in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition: And that, all conditions having been performed and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto, and had duly executed the same.*

The plaintiff demurred to this plea; the ground of demurrer stated in the margin being,—"that the plea shows no tender or payment of the composition to the plaintiff at or before the time appointed." Joinder.

Replication to the second plea,—that the defendant made default in payment of the said composition on the said 8th day of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days next after that day; and that the said composition still remains unpaid to the plaintiff, and that the same never has been paid or tendered to the plaintiff.

Rejoinder to the replication to the second plea,—that the plaintiff
*291] was not on and during the said 8th *day of May in the replication mentioned, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England.

To this rejoinder, the plaintiff surrejoined,—that he, the plaintiff, was a native of the empire of France, and, long before the accruing of the said debt in the declaration mentioned, was, and had always thence hitherto been, resident and carried on his business at Paris, in the said empire, and not in England; and that the plaintiff was not in England at the time of the contracting or accruing of the said causes of action, and that the said bill of exchange in the declaration mentioned was drawn by the plaintiff at Paris aforesaid, and was given by the defendant, and that the said accounts were stated for and in respect of the price of certain goods which were supplied by the plaintiff to the defendant, and the said goods mentioned as sold and

delivered in the second count were also supplied and sent by the plaintiff from his said place of business at Paris to the defendant; and that the plaintiff was not in England at the time of the making of the said deed by the defendant,—of all which premises the defendant had notice at the time of the executing of the said deed by him; and that the plaintiff had not notice of the making thereof at the time of the making or on the said 8th day of May, 1863, or within fourteen days after that day.

The defendant demurred to this surrejoinder; the grounds alleged in the margin being,—"1. That, notwithstanding the allegations of fact in the said surrejoinder alleged, yet the defendant was not bound in law to seek out the plaintiff in Paris, or elsewhere out of England, to pay or tender to him the composition. 2. That the surrejoinder does not allege that a reasonable time elapsed between the time of payment in the *composition-deed mentioned, and the commencement of this suit, within which the defendant could seek [*292 out the plaintiff in Paris, or elsewhere out of England, and pay to him the said composition. 3. That it is consistent with the said surrejoinder, that the said composition was not paid by the defendant to or received by the plaintiff, through his own default." Joinder.

Dowdeswell, for the plaintiff.(*a*)—Three principal questions present themselves in this case,—first, *whether the deed set out in the [*293 second plea operates as a release or only as a covenant not to sue,—secondly, whether the whole scope of the deed does not show that it was the payment of the composition which was to be the act to discharge the defendant, and whether the plea is not bad for not alleging payment or a tender,—thirdly, whether, where a man con-

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

Under the first demurrer,—"1. That the plea shows no fulfilment of the terms of the deed so far as the plaintiff is concerned; on the contrary, it only states a readiness and willingness to pay, but no tender:

"2. That the deed is not a composition-deed binding on non-executing or assenting parties, within the terms of the Bankruptcy Act:

"3. That the second rejoinder is bad, because the facts therein stated are wholly irrelevant, and that it was the duty of the defendant to have sought out the plaintiff and tendered to him the composition; that it differs widely from the case of an ordinary debt, where the parties creditors are or may be presumed to be cognisant of the time of the debt becoming due, and the debtor may reasonably be excused from tendering the debt or paying it on a stipulated day, but here the deed is executed behind the plaintiff's back, without his knowledge that any particular day was fixed for the payment; that here the party executing the deed, and seeking to avail himself of it, bound himself to pay on a given day, and he ought to have complied with the terms of that obligation, in order to enable him to avail himself of its protection; and that the facts stated in the replication, even if true, would afford no answer."

Under the second demurrer,—"That the facts stated in the surrejoinder afford no answer, if answer be necessary, to the rejoinder; that they show that the plaintiff did not voluntarily absent himself, and the defendant, when he executed the deed, ought to have known or ascertained that the plaintiff was in England, or at all events to have tendered the composition to the plaintiff; that, although a creditor absenting himself from England on the day on which a payment becomes due, may in ordinary cases absolve the debtor from tendering it, yet that rule does not apply where the creditor is a foreigner and abroad when the debt arises and becomes due, and the debtor contracted with him while residing abroad; that, at all events, the debtor is not absolved from tendering a debt under such a deed as the present, when he knew his creditor was a foreigner resident abroad; that it was the defendant's own act to bind himself to pay or tender the money to his creditor, and he cannot avail himself of the protection of his own deed, without compliance with its terms, when he had notice at the time that his creditor was not in England; and that it is no answer to a debt contracted abroad, or on a bill drawn abroad, to allege that the plaintiff was not in England when it became due, and the defendant was then ready to pay."

tracts with another in a foreign country to pay a debt on a given day, the creditor is bound to come to this country to demand payment.

1. The deed contains a covenant on the part of the defendant to pay the composition; and, in consideration of that payment, the parties of the second part (the creditors executing it) covenant to release the debtor from all claims,—saving their remedy on securities. This, though in terms a release, in effect amounts only to a covenant not to sue: Solby *v.* Forbes, 2 Brod. & B. 38 (E. C. L. R. vol. 6). 4 J. B. Moore 448 (E. C. L. R. vol. 16); Willis *v.* De Castro, 4 C. B. N. S. 216 (E. C. L. R. vol. 93); Price *v.* Barker, 4 Ellis & B. 760 (E. C. L. R. vol. 82). The Court will look at the general intent, rather *294] *than at the particular words of the instrument. Coleridge, J., in delivering the judgment of the Court of Queen's Bench in the last-mentioned case, says: "We quite agree with the doctrine laid down by Lord Denman in Nicholson *v.* Revill, 4 Ad. & E. 675 (E. C. L. R. vol. 31), 6 N. & M. 192, as explained by Baron Parke in Kearsley *v.* Cole, 16 M. & W. 136,† that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved: and we think that we are bound by modern authorities (see Solby *v.* Forbes, 2 Brod. & B. 38 (E. C. L. R. vol. 6), 4 J. B. Moore 448 (E. C. L. R. vol. 16), Thompson *v.* Lack, 3 C. B. 540 (E. C. L. R. vol. 54), and Payler *v.* Homersham, 4 M. & Selw. 423,) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." [WILLES, J.—It does not appear upon this record that there are any securities.] That is a matter which is exclusively in the defendant's knowledge. [WILLIAMS, J.—All these authorities are very fully commented upon by Vice-Chancellor Turner, in Squire *v.* Ford, 9 Hare 47.]

2. Then, as to the effect of the last proviso in the deed. It is the payment, and not the mere covenant to pay, that is to operate to discharge the debtor, and therefore the defendant was bound to aver either payment, or that he tendered the money. In the notes to Cumber *v.* Wane (1 Stra. 426), in 1 Smith's Leading Cases, 5th edit. 294, treating of a class of cases which are exempted from the doctrine laid down in the principal case, viz. "those in which a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand," the learned editors say: "Such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for, each in that case has the undertakings of the *295] rest as a consideration for his *own undertaking: Reay *v.* White, 3 Tyrwh. 596, 1 C. & M. 748.† [See the judgment in Boyd *v.* Hind, Cam. Scac. 1 Hurlst. & N. 938,† where the plaintiff's agreement, if any, was not with the debtor, but only with another of the creditors.] And so of an agreement to give time: Goode *v.* Cheeseman, 2 B. & Ad. 328 (E. C. L. R. vol. 22). But, if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it will cease to be binding on him: Garrard *v.* Woolner, 8 Bingh. 258 (E. C. L. R. vol. 21), 1 M. & Scott 327 (E. C. L. R. vol. 28). So, if the consideration in any manner fails, the agreement is at an end. Thus, if some creditors sign, on the faith that others

will do so, if the others hold out, those who have subscribed already are not bound: Reay *v.* Richardson, 2 C. M. & R. 422.† So, if it purport to pass an interest in lands, but want the formalities required by the Statute of Frauds, it will not bind the creditors: Alchin *v.* Hopkins, 1 N. C. 99 (E. C. L. R. vol. 27), 4 M. & Scott 615. Nor will the debtor be entitled to the benefit of it, if he neglect to perform accurately what is to be done on his part. Thus, he must tender the composition-money on the appointed day; for, as Lord Ellenborough said, in Cranley *v.* Hilary, 2 M. & Selw. 120, the party to be discharged is bound to do the act which is to discharge him: accord. Shipton *v.* Casson, 5 B. & C. 378 (E. C. L. R. vol. 11), 8 D. & R. 130 (E. C. L. R. vol. 16); Wenham *v.* Fowle, 3 Dowl. P. C. 43; Rosling *v.* Muggeridge, 16 M. & W. 181;† Evans *v.* Powis, 1 Exch. 601."† It was clearly incumbent on the debtor to tender the amount: readiness and willingness will not suffice: Hazard *v.* Mare, 6 Hurlst. & N. 434.† In that case, to an action of debt, the defendant pleaded, that, after the accruing of the debt he became bankrupt, and that, after the bankruptcy, he and P. R., in pursuance of the 230th section of the Bankrupt Law Consolidation Act, 1849, made an offer of composition, which was accepted by nine-tenths in number and *value of the creditors, the offer being to pay 4*s.* in the pound in full satisfaction of his debts, such composition to be paid to all the creditors in cash within fourteen days after the second sitting to be appointed under the 230th section; that the Court ordered the adjudication to be annulled; that P. R. joined in making the offer of composition, in consideration of all the effects of the defendant being assigned to him by the defendant; that the defendant and P. R. paid the composition to the other creditors; and that the defendant had always been ready and willing to pay, and brought into Court the amount of the composition on the plaintiff's debt, ready to be paid to him: and it was held that the plea was bad, for not showing a payment or tender within the fourteen days. "If," said Pollock, C. B., "this had been a mere voluntary agreement by all creditors, it is clear that payment or tender, or attempt to pay or tender, would have been necessary to make a defence to the original claim. The agreement set forth in the plea is distinct, that the *sum* agreed to be paid, and not the *agreement* to pay it, was to be taken in satisfaction of the original debt. Then, Evans *v.* Powis, 1 Exch. 601,† is in point against the defendant. It is said this leaves the debtor at the mercy of a recusant creditor, whose abode is not known, and who avoids a tender. Even if so, we think we ought not to construe the Act of Parliament otherwise than we do. But the objection is imaginary; practically, such difficulties will not occur. Debtors generally know where their creditors live: and we incline to think that a formal tender might not be required, if a reasonable effort to pay were made." [*296

3. Upon the third point, very little authority is to be found. Littleton in § 340 says: "Also, upon such case of feoffment in mortgage, a question hath been *demanded in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money [*297

to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for, he is bound to seek the feoffee if he be then in any other place within the realm of England. As, if a man be bound in an obligation of 20*l.* upon condition endorsed upon the same obligation, that, if he pay to him to whom the obligation is made at such a day 10*l.*, then the obligation of 20*l.* shall lose his force, and be holden for nothing: in this case it behoveth him that made the obligation to seek him to whom the obligation is made, if he be in England, and at the day set to tender unto him the said 10*l.*, otherwise he shall forfeit the sum of 20*l.* comprised within the obligation, &c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed ought to be made upon the land, &c., no more than if the condition were that the feoffor at such a day shall do some special corporal service to the feoffee, not naming the place where such corporal service shall be done. In this case the feoffor ought to do such corporal service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them that it shall be more properly said that the estate of the land is depending upon the condition, than to say that the *condition
*298] is depending upon the land, &c. Sed quære, &c." Lord Coke, commenting upon the words "within the realm of England," says, Co. Litt. 210 b: "For, if he be out of the realm of England, he is not bound to seek him, or to go out of the realm unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition." [WILLES, J.—That applies only to the case of one who was in England at the time the obligation is made, and who afterwards goes out of the realm.] Precisely so. It may be conceded that, if this had been the case of a contract entered into in England, and the plaintiff had by going out of England prevented the defendant from paying or tendering the money, the latter might have been discharged. But here the contract was made in Paris. Paris, therefore, is the locus solutionis.

Tapping, contrà.(*a*)—1. The deed set out in the second plea oper-

(*a*) The points marked for argument on the part of the defendant were as follows:—

As to the demurrer to the second plea,—"1. That the deed of arrangement and composition set forth in the second plea is a good and valid deed, and released the defendant from his then debts, by virtue of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134, ss. 185–191); and, such deed, registered in bankruptcy, is, although the plaintiff has not executed it, binding on him in all respects as if he had executed it:

"2. That the Court will not review the terms of the deed set out in such second plea, because it appears by such plea that the Court of Bankruptcy, acting under s. 187 of such Act, was duly satisfied that the terms of such deed were reasonable and calculated to benefit the general body of the defendant's creditors:

"3. That the alleged deed is one which this Court will adjudge to be reasonable in its terms, and calculated to benefit the general body of the defendant's creditors:

"4. That the consideration for the release contained in such alleged deed was, the defendant's covenant and agreement to pay a composition of 5*s.* in the pound, and not the actual payment thereof:

"5. That the last proviso in such deed, purporting to avoid the preceding release in case

ates as a release, and not merely as a *covenant not to sue. [*299
All the cases cited were cases of joint contractors, where the release of one was sought to be set up as a release of all. But there is nothing upon this record to bring the case within that category. The deed contains a clear and unambiguous *release, which is [*300
wholly unaffected by the provision in the subsequent clause saving the remedies of the creditors against third persons. There was a similar reservation of rights in the deed which in Keyes *v.* Elkins, 33 Law J., Q. B. 25, was held to be well pleaded as a release. The replication there raised the very point here taken. Cockburn, C. J., there says: "It is not necessary that we should say what would be the effect of the clauses in the Bankruptcy Act in cases of deeds in which there was no release,—whether the effect would be to give the debtor a remedy by having *recourse to the Court of [*301
Bankruptcy, or whether he would be able to plead the deed in bar to the action. In the case before us, we have matter which was not present in the case referred to: (*a*) we have a release by the creditors; and, for the purpose of considering Mr. *Cleasby's* argument, a release which is qualified by the reservation of the right

of default made in payment of the composition, does not legally limit or derogate from the absolute and unconditional character of such release:

"6. That it is not necessary for the defendant to specifically aver in his said third plea a tender or payment of the said composition to the plaintiff before or at the time appointed for payment, because the said plea, according to the Common Law Procedure Act, 1852, s. 57, avers generally the performance of all conditions precedent, which averment includes by implication an allegation of such tender or payment:

"7. And that the said third plea is in all other respects a good and perfect plea, answer, and defence in law to the plaintiff's claim."

As to the demurrer to the surrejoinder,—"1. That, notwithstanding the allegations of fact in the plaintiff's second surrejoinder, yet they do not show any legal obligation on the defendant to seek out the plaintiff in Paris, or elsewhere out of England, in order to pay or tender to him the said composition:

"2. That, according to the terms of the defendant's covenant to pay the composition, the defendant was not bound to seek out the plaintiff in Paris or elsewhere out of England, and to tender to him the amount of such composition: Co. Litt. § 340, 211 b, and Hargrave and Butler's notes thereto; Shep. Touchst. 378:

"3. That such second surrejoinder does not allege that a reasonable time elapsed between the time for payment in the composition-deed mentioned and the commencement of this suit, within which the defendant could or was obliged to seek out the plaintiff in Paris or elsewhere out of England, and pay to him the said composition:

"4. That it is consistent with all the allegations of the said second surrejoinder that the said composition was not paid by the defendant to or received by the plaintiff, through the plaintiff's own and sole default:

"5. That the only allegation in the second surrejoinder, of notice to the defendant of the facts in such surrejoinder contained, is a notice of facts at the time of the executing of the composition-deed, which manifestly cannot operate as notice of such facts as are alleged by the said surrejoinder to have occurred subsequently to the execution of such composition-deed, *i. e.* that the plaintiff thence hitherto continued resident in Paris, and carried on his business there:

"6. That the plaintiff being resident and carrying on business out of England, should, in order to take advantage of the last proviso in the composition-deed, have given before action due notice to the defendant of some place in England where he might perform his covenant to pay, by paying or tendering the amount of such composition, which is not alleged:

"7. That the plaintiff had notice of the making of the said composition-deed, because it appears by the defendant's third plea that the arrangement meeting was duly held, which implies a publication thereof in the London Gazette:

"8. That such second surrejoinder is in other respects bad in substance, and does not allege facts which constitute a legal answer to the defendant's pleadings."

(*a*) Ipstones Park Iron Ore Company *v.* Pattinson, 2 Hurlst. & Colt. 828, 33 Law J., Exch. 193.

of the creditors in proceeding against the sureties. Now, Mr. *Cleasby* says, that, according to legal principles, such a release of the debtor would not operate as a release absolutely, but only as a covenant not to sue; but he seems to admit that the effect of such a release might be pleaded in bar to an action brought by a person who was a party to the deed; though he contends that it could not be so pleaded to an action by a person who is only a party to the deed by reason of the provisions of the Bankruptcy Act, 1861, in s. 192. But I find that those provisions amount to a statutory enactment, that, with regard to a creditor who does not execute the deed, the release shall, if the requirements of the section are carried out, be as valid and effectual and binding on him as if he had been a party to and had duly executed the same. The execution by the necessary proportion of the creditors is therefore considered as the execution of all the others, and the creditor who does not execute must be taken as being bound by the deed. But I feel, after what Mr. *Mellish* has said, that we need not decide the case upon that ground; for, it seems to me that there is here a good release to the debtor, and not merely a covenant not to sue. Mr. *Mellish* says that it is an absolute release by all the creditors, with the exception of those who have sureties, in which case they reserve to themselves the right to proceed against
*302] them. Now, the plaintiff *has no person in the position of a co-debtor, and therefore he has absolutely released the debtor; the only way the objection could prevail would be by reason of producing inequality among the creditors; but the statute says that the deed shall be binding unless it contains something unreasonable. Now, to make it unreasonable on the ground of inequality among the creditors, there ought to be some substantial inequality. In substance and essence, whether it be a release or a covenant not to sue, the deed may be set up to prevent an action being brought against the debtor. I cannot see any real effectual inequality, or anything to show that it is unreasonable: and therefore I hold it a good deed under s. 192, and that the plaintiff is bound by it." And Crompton, J., intimated an opinion that Clapham *v.* Atkinson, 4 Best & Smith 722, 730 (E. C. L. R. vol. 116), was practically the same as the case then before the Court, and that the plea was good as showing an equitable defence to the action. [WILLES, J.—That case is very much in point in your favour.]

2. It must be conceded that the plea would be insufficient as a plea of tender: Roberts *v.* Brett, 6 C. B. N. S. 611 (E. C. L. R. vol. 95). But there is a general allegation of the performance of all things necessary to make the deed valid and binding upon the plaintiff, under the 57th section of the Common Law Procedure Act, 1852. In Bentley *v.* Dawes, 9 Exch. 666,† the declaration stated that the defendant had contracted to sell, and the plaintiff to purchase and accept from the defendant, a large quantity of iron, &c., and "the plaintiff averred performance of all conditions precedent, and that all things had been done and happened to entitle the plaintiff to have and receive the whole of the said quantity of iron," and that, although the defendant had delivered a part of the said iron, and although a reason-
*303] able time had elapsed, and although the plaintiff *was ready and willing to accept and receive the residue of the iron, of

which the defendant had due notice, yet the defendant had not delivered the residue of the said iron in pursuance of the said contract: and it was held, on demurrer, that the general allegation of performance, and of all things having happened to entitle the plaintiff to receive the whole of the iron, contained a sufficient statement that the plaintiff was ready and willing to pay for the residue of the iron on delivery. Upon the authority of that case, it is submitted that this averment is sufficient to cast upon the plaintiff the onus of showing by his replication that no tender has been made.

3. Upon the authority of Co. Litt. § 340, Shep. Touchst. 378, and the dictum of Dampier, J., in Cranley *v.* Hillary, 2 M. & Selw. 120, the rejoinder is a good answer to the replication. In Sheppard, it is said, that, "if the condition of an obligation be to pay money or do any like transitory act to the obligee on a day certain, but no place is set down where it shall be done, in this case it must be done to the person of the obligee, wheresoever he be; and for this purpose the obligor must at his peril seek out the obligee, if he be intra quatuor maria, otherwise the obligation is forfeit: but, if the obligee be not within the kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing." And Dampier, J., in Cranley *v.* Hillary, says: "It is laid down in Littleton, § 340, that the obligor of a bond conditioned for the payment of money at a particular day, is bound to seek the obligee *if he be in England*, and at the set day to tender him the money, otherwise he shall forfeit the bond." [WILLES, J.—That supposes the obligation made in England. But, how if it were made abroad?] There is nothing but the first count to show that the *bill here sued upon was a foreign bill: the plea and replication are to the whole cause of action. The place where a bill [*304 is made payable is the test whether it is an English or a foreign bill: Rothschild *v.* Currie, 1 Q. B. 43 (E. C. L. R. vol. 41). [WILLES, J.—Is the obligation for ever gone? or the feoffment for ever valid?] The duty of demanding the money or the land again is cast upon the obligee or feoffee. The same law is laid down in Haldane *v.* Johnson, 8 Exch. 689,† where all the authorities are reviewed by Baron Martin. Is the debtor to dodge his creditor all over the world?

The surrejoinder is altogether informal. The material time is not "the time of the accruing of the causes of action," but the 8th of May, 1864, the day on which the composition was payable: 24 & 25 Vict. c. 134, s. 187.

Dowdeswell, in reply.—Upon general principles, this deed cannot operate as a release: it amounts only to a covenant not to sue. It cannot be so construed as to have one operation as to some of the parties and another as to others. Keyes *v.* Elkins, 34 Law J., Q. B. 25, is at variance with Price *v.* Barker, 4 Ellis & B. 760 (E. C. L. R. vol. 82). If the creditor's remedy be suspended for an instant, it is gone altogether. The defendant was bound to plead performance: readiness and willingness alone will not do: The London Dock Company *v.* Sinnott, 8 Ellis & B. 347 (E. C. L. R. vol. 92).

ERLE, C. J.—I think our judgment in this case should be for the plaintiff. It is unnecessary to decide whether the deed set out in the plea amounts to a release or operates only as a covenant not to sue,

because I hold the plea to be bad for not averring payment or a tender of the composition. The covenant is, that Mugnier will on or before
*305] the 8th of May next pay *unto each of the parties of the second part, his creditors, a composition of 5*s.* in the pound on the amount and in full discharge of their respective debts and claims. And at the end of the deed is a proviso, that, if Mugnier shall make default in payment of the said composition on the said 8th of May next, and such composition shall remain unpaid for the space of fourteen days next after that day, the release thereinbefore contained shall be void and of none effect. Now, the plea contains no averment that the composition was paid or tendered or offered to the plaintiff. All that is averred, is, that the defendant had always been and still was ready and willing to pay. I think that is not enough. And the general averment at the end of the plea, that, all things having happened necessary in that behalf, the plaintiff became and was bound by the deed as if he had been a party thereto and had duly executed the same, only relates to such conditions as are essential to make the deed binding upon the plaintiff as a non-executing creditor, but not to conditions to be performed subsequently by the debtor. Then, as to the excuse for not paying or tendering the money, set up in the rejoinder, viz., that the plaintiff was not on and during the said 8th day of May, in the replication mentioned, and for the space of fourteen days next after that day, within the realm of England, but was out of the realm of England,—the authorities seem to me to establish this distinction; that, if the plaintiff was in England when the contract was made, and went beyond the seas afterwards, the law would not cast upon the defendant the duty of following him for the purpose of paying or tendering the money. The contract in that case would be construed to mean, that the debtor would on the day named pay the creditor the money, provided he was then in
*306] England ready to receive it. But where, *as here, the contract was made in Paris, and the plaintiff was residing in Paris at the time of the execution of the deed, and at the time of its registration, his absence abroad affords no excuse for the defendant's not tendering him the money.

WILLIAMS, J., WILLES, J., and KEATING, J., concurring,

Judgment for the plaintiff.

CALVERT *v.* THE SCINDE RAILWAY COMPANY. *Jan.* 31.

In an action by an engineer against an Indian railway Company, for wrongfully dismissing him from their service without notice, the defendants at the trial consented to a verdict being entered for the plaintiff for 350*l.*, being 200*l.* for a quarter's salary, and 150*l.* for the plaintiff's passage home to England; and, on taxing his costs, the Master allowed the plaintiff (who was a material and necessary witness) subsistence-money during his stay in England waiting for the trial (a year and a half), at the rate of 300*l.* a year, and also 150*l.* for his passage out to India,—it appearing that the Company justified their dismissal of the plaintiff, on the ground of alleged improper conduct, and that the trial had been delayed for twelve months in consequence of the defendant's having obtained a commission for the examination of witnesses at Lahore, the execution of which had been unreasonably delayed; and the plaintiff swearing that he was going back to India, where he had left his wife and family:—Held, that the allowances were not excessive.

THIS was an action brought by the plaintiff to recover from the defendants damages in respect of his wrongful dismissal from their service, and for not providing him with a passage from Lahore to England pursuant to their contract.

The first count of the declaration stated that it was agreed by and between the plaintiff of the one part and the defendant of the other part, that the plaintiff should engage himself in the service of the defendants, and serve them as district engineer in India, and that the defendants would retain and employ the plaintiff in the said capacity, in India, *for the term of three years from the 27th of January*, 1862, on the terms following, that is to say, that the plaintiff should reside *in such place, and remove from time to time to such place or places in India, and occupy and employ himself, as should [*307 be required by the agent or chief engineer of the defendants in India; and that the plaintiff should faithfully and diligently employ himself in the service of the said defendants as district engineer in such other manner and at such place or places as the agent or chief engineer of the defendants should require, and devote the whole of his the plaintiff's time and attention to the service of the said defendants; and that the plaintiff should render and perform due, faithful, and exclusive services for the said defendants for the said three years as aforesaid; and that the defendants should, in consideration thereof, pay to the plaintiff during the continuance of his said services the sum of 800*l.* per annum, in India; that if the plaintiff should at any time omit, neglect, or refuse to perform any of the duties required of him, or all or any of the orders of the said agent or chief engineer of the said defendants, or should in any manner misconduct himself, it should be competent to the defendants or their agent at Lahore to declare the employment of the plaintiff at an end, and in such case the said defendants should not be under any obligation to provide the plaintiff with a passage to England, or to pay any travelling-expenses connected therewith; that, in the event of the defendants' becoming desirous to terminate the engagement of the plaintiff at an earlier period than three years from the commencement thereof, they should be at liberty to do so, on giving him six calendar months' notice, determinable at any period of the year, signed by the secretary or agent or other person authorized in that behalf, by leaving such notice at the last or last-known place of residence of the plaintiff in the East Indies, but in that case the defendants should, provided the *engagement should have been terminated, provide the plaintiff with a pas- [*308 sage to England, and pay the travelling-expenses of the plaintiff at the expiration of the said term of three years, if the conduct of the plaintiff should have been satisfactory to the defendants, or in the event of his being under the necessity from illness of returning home, provided that it should be satisfactorily established that such necessity existed, and that it was not occasioned by any impropriety on the part of the plaintiff, and that he should be provided with a certificate of good conduct from the proper officer of the defendants in that behalf: that the plaintiff accordingly engaged himself in the service of the defendants in the capacity and on the terms aforesaid; and that, although all conditions were performed and all things done and happened, and all times elapsed necessary to entitle, and nothing happened to disen-

title, the plaintiff to have the said agreement performed by the defendants, and to maintain this action for the breach thereof thereinafter alleged, and although the plaintiff entered into the said service in the capacity and on the terms aforesaid, and served the defendants for a portion of the said three years, and was always ready and willing to continue in the said service in the capacity and on the terms aforesaid during the remainder of the said three years, whereof the defendants always had due notice,—yet the defendants before the expiration of the said three years, and without any such notice as in the said agreement provided, wrongfully dismissed the plaintiff from the said service in India, whereby he lost all the salary and profits which he would have derived from being retained therein, and was forced and obliged to remove himself and his family at a great expense from that part of India in which he had resided whilst in the defendants' employment, and to sell off his goods, *chattels, and household effects, at a great loss,
*309] and was for want of funds, and by reason of the premises, forced and obliged to remain in India, and disabled from returning home to England with his family, to his great loss and detriment.

There was also a count for work and labour, money paid, and money found due upon accounts stated.

The defendants pleaded, amongst other pleas, as follows:—That, before the dismissal of the plaintiff, the plaintiff, in breach of the terms of the said agreement, omitted, neglected, and refused to perform divers duties required of him, and divers orders of the said agent and chief engineer of the defendants, and otherwise misconducted himself, to wit, by an open defiance of the orders of the said chief engineer, instead of transferring the temporary charge of his district to one Phillips, during the plaintiff's absence on leave, intrusting the same to a native moonshee, with instructions not to attend to any directions he might receive from the defendants' engineers in the district; and also by wrongfully, improperly, and in breach of his duty, charging the defendant with the salary of a baboo; and also by improperly attempting to intimidate one Strong into attaching his name to a false statement, with the object of injuring Mr. Phillips, one of the defendants' servants; and also by vexatiously and without any probable cause making a false and unfounded accusation seriously affecting the integrity of Mr. Strong, one of the defendants' servants; and also by omitting to refer to the defendants' chief engineer (as the plaintiff was bound to do) a matter relating to one of the defendants' officers, and in lieu thereof applying to the deputy commissioner of Gorgavia to take proceedings against such officer, in breach and violation of the duty which the plaintiff then owed to the defendants; wherefore the
*310] defendants, *agreeably to the power given them by the said agreement, declared the employment of the plaintiff at an end, and dismissed him from the defendants' said service.

The cause being at issue, notice of trial was given for the sittings after Michaelmas Term, 1863, and it would have been tried at those sittings, but the defendants on the 7th of December obtained an order for the examination of witnesses at Lahore under a commission. The commission was not sent out until the 26th of July, 1864, and was not returned until the 8th of December, 1864. The cause came on for

trial on the 20th of December, when the defendants by their counsel consented to a verdict being entered for the plaintiff for 350*l.*,—being 200*l.* in lieu of a quarter's salary under the agreement, and 150*l.* for his passage-money and travelling-expenses to England.

On the taxation of costs, the plaintiff claimed and was allowed by the Master, besides the general costs of the cause, subsistence-money at the rate of 300*l.* per annum for a year and a half during which he was necessarily detained in this country for the purpose of attending and giving evidence at the trial, and also 150*l.* for his passage and expenses back to Lahore, where he swore that his wife and family were residing, and he intended to return.

Lush, Q. C., on a former day in this term moved for a rule nisi to review the taxation, on the ground that the allowance for subsistence-money was excessive, and that the passage-money and travelling-expenses to England had been included in the verdict. [The Master stated that he should, but for that circumstance, have allowed passage-money and expenses *both ways*.]

The rule was granted, subject to payment of the residue of the costs within four days.

**Bovill*, Q. C., and *Woollett*, on a subsequent day, showed cause.—Subsistence-money has always been allowed where a [*311 witness is necessarily detained in this country to await the trial of a cause: and the reasonableness of the amount is for the discretion of the Master: Platt *v.* Greene, 2 Dowl. 216. In Evans *v.* Watson, 3 C. B. 327 (E. C. L. R. vol. 54), in an action for breach of a charter-party, the trial having been postponed at the instance of the defendants, the plaintiff detained the captain of the vessel in this country for a period of three hundred days, having been advised by counsel that he could not safely examine him under the 1 W. 4, c. 22, the defendants having intimated an intention to call witnesses to impugn his conduct: and it was held, that, upon taxation of the costs, the plaintiff was entitled to subsistence-money for the witness during the whole period of his detention. "If," said Tindal, C. J., "the witness had been wantonly and unnecessarily kept here by the plaintiff, the case would have been very different. But I am of opinion he was under the circumstances very properly detained for examination vivâ voce, in consequence of the intimation from the defendants that they meant to impugn his conduct." And Coltman, J., said: "The Court is bound to award to a successful plaintiff all costs reasonably and properly incurred by him in the prosecution of his suit. I think, after the notice that the defendants meant to attack him, the plaintiff was perfectly justified in detaining the witness for examination in open Court." [WILLES, J.—If this gentleman had been a witness for any one else, there would have been nothing extraordinary in the allowance.] The circumstance of his being plaintiff in the cause makes no difference. In Howes *v.* Barber, 18 Q. B. 588 (E. C. L. R. vol. 83), the plaintiff, a master-mariner, remained in England unemployed, from the issuing of the writ in *September, 1851, solely for [*312 the purpose of giving evidence in the cause, until January, 1852, when the trial took place: and it was held that the Master, on taxation, was justified in allowing him subsistence-money during that period. So, in Dowdell *v.* The Australian Royal Mail Steam Naviga-

tion Company, 3 Ellis & B. 902 (E. C. L. B. vol. 77), the plaintiff was allowed subsistence-money from the commencement of the action, before Michaelmas Term, till the disposal of a rule for a new trial in Easter Term, he being found by the Master to have been a material and necessary witness. [KEATING, J.—What was there to prevent the plaintiff's being examined upon interrogatories in India?] The state of the record here abundantly shows that the presence of the plaintiff was essential if the cause had been tried out. The plea charged him with misconduct. [ERLE, C. J.—The allowance for the return voyage presents the greatest difficulty to my mind.] The plaintiff came from Lahore for the purpose of attending the trial. His family remained there; and he swore that he was about to return thither.

Lush, Q. C., and *Sir G. Honyman*, in support of the rule.—The question is, whether the Master has not somewhat exceeded the limits of discretion in allowing the plaintiff the expenses of his voyage back to India, and subsistence-money for so long a period as a year and a half, he having already been allowed 150*l.* for his voyage and expenses from India to England. He went out at first at the Company's expense; and their contract with him was, to provide him with a passage home at the expiration of the period of his service. What more could he be entitled to? *Cur. adv. vult.*

ERLE, C. J., now delivered the opinion of the Court:—

*313] *This was a motion to review the taxation of the plaintiff's costs. The plaintiff had been engaged to serve the defendants, an Indian Railway Company, in the capacity of district engineer, at a salary of 800*l.* per annum, and brought this action against the Company to recover damages for dismissing him from their service contrary to the terms of the contract. At the trial before me at the Sittings after last Michaelmas Term, the defendants consented to a verdict being taken against them for 350*l.*, being 200*l.* for a quarter's salary, and 150*l.* for the plaintiff's passage home to England, which by the terms of the contract he was entitled to. Having brought his action,—which was delayed a year in consequence of an order obtained by the Company for the examination of witnesses in India,—the plaintiff stayed in England, for the purpose of giving evidence at the trial, for about a year and a half: and the Master, on taxing his costs, has allowed him subsistence-money for that period at the rate of 300*l.* per annum, and a further sum of 150*l.* for his voyage back to Lahore. We have felt much impressed with the necessity of exercising great caution, in order to prevent a party residing abroad, who chooses to bring an action here, from putting his opponent to such heavy expenses as this. But we have come to the conclusion that the allowance which has been made in this case is within the principle of law which is applicable to this subject. At the same time, we think it is the bounden duty of the Master not to allow a wanton accumulation of costs, but to exercise the most scrupulous care in checking everything which has a tendency to aggravate the burthen which the law casts upon the unsuccessful party to the litigation. In the present case, I see no sign of an attempt on the part of the plaintiff needlessly to inflame the costs: but I do see some-

thing like signs of wilful delay on the *part of the defendants, [*314
for which I can find no excuse. The sum allowed in this case is undoubtedly very large. But I think it is authorized by the principle laid down by this Court in Reynolds *v.* Harris, 3 C. B. N. S. 267 (E. C. L. R. vol. 91), in the judgment of Cockburn, C. J. His Lordship says: "We should be sorry to admit it possible that there is any imperative rule of law or inveterate practice, by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the information of the Judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side. We apprehend that we may, and if we may we ought, to prevent our proceedings from being abused and perverted; and that we ought not to abstain from doing so in a case where the truth appears, because there may arise many others in which we cannot arrive at it. *We apprehend that the Court is bound not to allow a successful party all the expense he may have thought proper to incur, where we can see that part of it has been needless.* If a party were to insist upon calling fifty witnesses to prove a notorious fact formally involved in a disputed issue, we may doubt whether the Judge could lawfully reject the evidence of any one of them: but we cannot doubt that the Master would not allow, and that the Court would uphold the Master in not allowing, the expenses of them all. *Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be, and is in practice, disallowed.*" The same principle was recognised in Evans *v.* Watson, 3 C. B. 327 (E. C. L. R. vol. 54). We have carefully considered this matter; and, if we had not been perfectly satisfied that no injustice has been done, a review of the taxation would have been ordered. We think it right, though it is hardly *necessary, to warn the Masters that great care and [*315
caution are to be observed in such cases as these. We think the rule must be discharged with costs.

Rule discharged, with costs.

LANGTON and Another, Assignees of HOLLWAY and Others, Bankrupts, *v.* WARING and Others. *Jan.* 18.

A. & Co. contracted with B. & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B. & Co. in timbers of length sufficient when sawn asunder to make each two sleepers. After several deliveries had taken place, one of the firm of B. & Co. called at the office of A. & Co., and obtained from A. an advance of 600*l.* "*on account of the last cargo of timber,*" *which he represented to be and which then was at the wharf of B. & Co.*, and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A. & Co. (who had possessed themselves of them) as to entitle them to retain them as against the assignees of B. & Co., who had become bankrupt after the advance.

THIS was an action brought by the assignees of Messrs. Hollway, Hart & Co., bankrupts, against the defendants, for the conversion of a quantity of timber and railway sleepers, under the circumstances hereinafter mentioned. By consent, and under a Judge's order,

the following case was stated for the opinion of the Court, without pleadings:—

1. The bankrupts carried on business as timber-merchants, under the firm of Hollway, Hart & Co., at King's Lynn, in the county of Norfolk. The defendants are, and were at the time of the transactions hereinafter detailed, railway contractors, carrying on business in Victoria Street, Westminster, under the firm of Waring & Co., and were constructing the works of the Lynn and Sutton Railway.

2. In the months of May and June, 1863, a correspondence took place between the defendants and the bankrupts relative to the supply by the bankrupts to the defendants of a quantity of sleepers for the said railway, and of which the following are the material parts:—

*316] *May 16th, 1863. Waring & Co. to Hollway, Hart & Co. "We shall require about 17,000 or 18,000 sleepers for the Lynn and Sutton Railway. They will be as follows (stating the sizes required). We shall be glad to receive your price for the above."

June 16th, 1863. Hollway, Hart & Co. to Waring & Co.

"We beg to annex our price for foreign sleepers for the Lynn and Sutton Railway. Should you not require them for two or three months, of course we can arrange the shipments accordingly.

"Delivered alongside wharf.

"10,000 8×4 at 1*s.* 8*d.* each.
" 5,000 9×4½ at 1*s.* 10*d.* "
" 2,500 11×5½ at 2*s.* 9*d.* "

June 8th, 1863. Waring & Co. to Hollway, Hart, & Co.

"Lynn and Sutton railway sleepers. Let me know whether you could supply a large number of the 9×4½ sleepers at the price quoted, say,

" 3,000 . . . 8×4
"14,000 . . . 9×4½
" 3,000 . . . 11×5½

"Also say what is the port where they would be shipped from, and whether they are red wood, and well grown; as I should not take white Dantzic or soft grown timber. They must be good, sound, well-grown stuff. The prices will suit, if the article is really good. Payment, six months' bill, renewable, at our option, three months, at bank rate of interest."

June 9th, 1863. Hollway & Co. to Waring & Co.

"You can have your quantity of sleepers at the prices quoted, all good, sound, well-grown Dantzic red wood. Four months, and renewable for three months. Reply, post to-night."

*317] *June 10th, 1863. Waring & Co. to Hollway & Co. "I have received your telegram. You must take six months' bill, renewable for three months. Let me know if you agree to this, and the matter will be settled. The sleepers to be delivered as late in the season as will be practicable; say, October 1st."

3. Either by letter or telegram, the above terms were accepted by Hollway, Hart & Co. In the following July, the terms were by letters between the parties modified so far as that the defendants agreed to pay cash instead of bills, on being allowed a certain discount, which is not at present material.

4. A large portion of the sleepers were delivered and paid for under

the above contract: and in the month of December, 1863, the last lot only remained to be delivered. Hollway, Hart & Co. imported the timber from Dantzic in pieces each of which when sawn made two sleepers. The cargoes were discharged at the wharf and premises of Hollway, Hart & Co. at Lynn, where the timbers were sawn into sleepers as just mentioned, and then delivered alongside the wharf of the defendants, also at Lynn, at a distance of about half a mile from Hollway, Hart & Co.'s works,—that being the wharf mentioned in the letter of the 6th of June, 1863, already set forth. The defendants knew that the timber was imported in sizes double those of the sleepers required, and that they required to be sawn up by Hollway, Hart and Co., before delivery.

5. The last cargo consisting of the timber necessary to complete the contract, arrived from Dantzic at the wharf of Hollway, Hart & Co. on the 14th of December, 1863; and on the 16th of December, John Hart, the younger (one of the firm), called at the office of the defendants at Lynn, and, in manner detailed in the examination set out in the appendix, asked for an advance of 600*l.* on account of that cargo.

*Thereupon, Mr. Annett, the clerk to the defendants at Lynn, communicated with his principals in London (the defendants), and [*318
on the 19th, Mr. Eckersley, one of the defendants, came to Lynn, and made the advance requested. The details of what passed between John Hart, the younger, and Mr. Annett, and Mr. Eckersley, appear in the examination of these gentlemen before the Bankruptcy Court, copies of which were appended to, and formed part of the case.(*a*)

(*a*) Mr. Eckersley's examination before the Bankruptcy Court was as follows:—

"William Eckersley, of King's Lynn, in the county of Norfolk, contractor, being sworn and examined, &c., upon his oath saith,—I am a member of the firm of Waring, Brothers, & Eckersley, of Victoria Street, Westminster, contractors. We are the contractors of the line between Lynn and Sutton. In May last, we entered into a correspondence with the bankrupts for the supply of sleepers for this line. The contract was for 20,000 sleepers, which was contained in several letters. We have a clerk named Annett, who was our cashier at Lynn. He was only cashier, and kept the books. We had a manager on the line. On the 17th of December last, I got the following letter:—

"Contractors' Office, King's Lynn, 16th Dec. 1863.

"Dear Sir,—Mr. Hart has just called in to know if you could oblige him with a check for 600*l. on account of the cargo of sleepers now in:* he gives as a reason for this application, that he is called upon by his people at Dantzic to pay for the whole lot of sleepers he has had from them, and had hoped to have been paid by us for the last lot long ago; but the vessel has been so long on the way that the time for settling with his Dantzic firm had expired. He also says that the whole lot when sawn and delivered will come to between 800*l.* and 900*l.* In case you consent to let him have it, I enclose a check filled up. R. C. F. Annett."

On receiving this letter, I did not send the check; but I wrote to Mr. Annett to say that I should be at Lynn the next day, and would give him the necessary checks for the pay and Mr. Hart, &c. I went down on the 19th, and saw Mr. Hart, who called at our office. He said he had been pressed for money by the parties from whom he had the sleepers, and that the vessel had been delayed by the stormy weather, and that it would be a great convenience to him if I would advance him *on account of this cargo.* I agreed to do so, and gave him a check. I did not hand him the check personally. I handed it to Mr. Annett, who handed it to Mr. Hart in my presence: but what I state represents the whole transaction. *He asked for the money on account of that cargo then being discharged, and I agreed to give it to him on account of that cargo.* No receipt was taken, so far as I know. He said nothing about security: but I considered the cargo as security, but repeated his request that I would make him an advance either *on cargo, or on account of the cargo.* I do not recollect which word he used. I had made other payments on account of the contract for sleepers, but, so far as I know, not by way of anticipation. Mr. Hart stated on the 19th that the sleepers would be cut up very soon, and would be delivered very soon. On the 5th of January, I first heard that Hart Jr. had absconded. Previously to this, I had asked why the sleepers had not been delivered, and had directed my

*319] *6. All previous deliveries under the contract had been settled for, and the account between the parties stands in the defendants' books in the manner set out in the following account:—

Dr. Hollway, Hart & Co.			£	s.	d.	Contra.			£	s.	d.	Cr.
1863.						1863.						
September 2.	To Cash		54	0	0	August 13.	By timber		54	0	0	
" 4.	"	"	274	0	0	" 24.	" sleepers		274	0	0	
" 15.	"	"	360	0	0	September 14.	"	"	360	0	0	
" 21.	"	"	495	0	0	" 18.	"	"	495	0	0	
October 7.	"	"	47	0	0	" 25.	" timber		47	0	0	
November 11.	"	"	83	0	0	October 31.	"	"	83	0	0	
December 5.	"	"	27	0	0	November 30.	"	"	27	0	0	
" 16.	"	"	600	0	0		Balance . .		600	0	0	
			£1940	0	0				£1940	0	0	

So far as regards the balance, the same was struck by the defendants' clerk on or about the 15th of January, 1864.

foreman to press for delivery, as we wanted the sleepers on the line. The moment I heard that Hart had absconded, I became anxious to have the sleepers in my possession, as I considered I had bought and paid for them: and shortly afterwards I took advice, and, acting upon it, I gave instructions to my people to take possession. Before my men took the sleepers, I saw Mr. Beloe, and I told him of my intention to take the sleepers. As far as I remember, I said the sleepers were ours, and we should take them. On that occasion, I don't remember making use of the word mortgage. *I am prepared to state that I advanced the 600l. on account of the specific cargo.*"

The examination of Mr. Annett was as follows:—

"Richard Charles Francis Annett, of King's Lynn, in the county of Norfolk, cashier and clerk to Messrs. Waring, Brothers, & Eckersley, the contractors for the Lynn and Sutton line, being sworn and examined, &c., upon his oath saith. On the 16th of December last, Hart, Jr., called on me and said, 'I have just called in to know if you think Mr. Eckersley would object to let us have (referring to the firm) 500*l.* or 600*l.* *on account of the cargo of sleepers now in.*' I replied, 'Well, you know that Mr. Eckersley is at present in London; but there will be no harm done if I write telling him of your application; and I can let you have an answer by Friday morning.' He replied, 'I want it by to-morrow.' He stood thinking for a few moments, and then said, '*Well, Friday will do;* will you write him by this post?' I wrote the letter in his presence to Mr. Eckersley: he did not read the letter that I wrote: but he answered my questions whilst I was writing the application to Mr. Eckersley, and I therefore felt satisfied that I was giving a correct version of the application. I made a note in my diary,—'Hart called to know if we could let him have 600*l.* on account of cargo now in: told him I would write Mr. E. by this post.' On the Friday, the 18th, Mr. John Hart, Jr., called again just after post-time, to know what reply Mr. Eckersley had sent. I replied, 'I have received no letter from Mr. Eckersley this morning, and therefore I am afraid he is away from London.' Later in the day, I received a telegram from Mr. Eckersley, that he would be at Lynn on Saturday, at 12. I then sent word to that effect to Hart, Jr., and advised him to be in the way on Saturday. On Saturday, the 19th, I received a letter from Mr. Eckersley, repeating his telegram, that he would be at Lynn at 12, and adding, 'I will then give you the necessary checks for the pay, and Mr. Hart, &c.' Mr. Hart came in some time during the morning, and I then told him it was certain Mr. Eckersley would be here, and that he had better be in the way to answer any questions Mr. Eckersley might wish to put to him as regarded a reason for the application. At 3 o'clock that afternoon, Hart Jr. called, and saw Mr. Eckersley and myself; when Mr. Eckersley said to him, 'I did not send your check, as I was coming down. I have no objection to your having the check, but *tell us when the sleepers are likely to be delivered.*' He replied, '*They are sawing away at them now, so that in a few days the whole cargo will be delivered.*' The check was then signed by Mr. Eckersley, who handed it to me, and I handed it to Hart, Jr., at the same time saying, 'I must have some kind of receipt for this check, or I shall have nothing to show for it.' He replied, 'Oh, look here: I will endorse it in your presence; for, *you will receive the account for the whole cargo next week, and then I shall have to trouble you for* 200*l.* *or* 300*l.* *more.*' Nothing was said by Mr. Eckersley or myself against this arrangement, the matter being treated in good faith, and not a doubt cast on either side. I subsequently made a note in the aforesaid diary of his calling, which, as far as I can recollect, was, 'John Hart called and received his check;' and, when entering up my

*The balance of 600*l.* in that account represents the state of the account when that sum had been advanced; but the price [*320 of the whole of the sleepers remaining to be delivered under the contract was between 800*l.* and 900*l.*

*7. On the 29th of December, and before any of the sleepers were delivered, John Hart the younger committed an act of [*321 bankruptcy, by absconding, taking with him, amongst other moneys belonging to the firm, the proceeds of the check for 600*l.* handed to him by Mr. Eckersley.

*8. On the 5th of January, 1864, Mr. Eckersley saw Mr. Beloe, then the attorney for John Hart, the younger, and Mr. [*322 Hollway, and claimed the sleepers, as mentioned in his examination.

9. On the 9th of January, however, the defendants sent about two hundred men to the works of Hollway, Hart & Co., and took away 971 sleepers sawn up and ready for delivery, and 539 pieces of timber not then sawn up or converted into sleepers. The seizure and *taking away were against the will and without the consent of Hollway, [*323 Hart & Co., who had not then been adjudicated bankrupts. The sleepers seized were all made from timber which had formed part of the cargo which had arrived as before mentioned on the 14th of December. The timber seized was part of such cargo.

10. Messrs. Hollway, Hart & Co. were adjudicated bankrupts on the 19th of January, 1864, on a joint petition by a creditor. The acts of bankruptcy on which the adjudication took place, were, as regards Henry Hollway, and John Hart, the elder, declarations of insolvency filed by them on the said 19th of January, 1864, and as regards John Hart, the younger, his absconding on the said 29th of December, 1863.

11. The plaintiffs were duly appointed assignees of Hollway, Hart & Co.

12. It was admitted that before action the assignees made a demand of the sleepers and timber, which was met by a refusal on the part of the defendants.

cash-book, I made a note on a slip of paper for the voucher-book, to the following effect:—'King's Lynn, 19th December, 1863. Memorandum. Paid Mr. John Hart, for Hollway & Hart, 600*l.*, by check, on account of cargo per Mare, per pro. Waring, Brothers, & Eckersley, R. C. F. Annett:' and, when hearing of John Hart's absconding, I went to the bank and got the check bearing his signature for the 600*l.* I omitted to mention, that, when Hart Jr. called on me on the 16th of December, I told him, 'I must give some reason in my letter to Mr. Eckersley for your application, or I don't think that you will have it.' He replied, '*This cargo, when sawn and delivered, will come to between* 800*l. and* 900*l., so that I shall have to trouble you for* 200*l. or* 300*l. more, if he lets me have the* 600*l.*' I first heard about Hart Jr. having absconded, on Monday, the 4th of January last. I have a note in my diary of the 2d of January, which is as follows,—'Mr. Beloe called to know if I could tell him what moneys had been lately paid to Messrs. Hollway & Hart, and also to know if we did not owe them 200*l.* or 300*l.* on some contract. I told him that he must be referring to the present cargo of sleepers now in, on which Mr. John Hart, Jr., had already asked and been paid 600*l.* on account of, and which he stated at the time would come to between 800*l.* and 900*l.*, thus leaving 200*l.* or 300*l.* for us to pay when they were all delivered.' On Tuesday, the 5th of January, I saw Hart, Sr., to whom I had written intimating my intention to take away the sleepers. We took possession on the 9th, of

sawn . . .	971	9×4½
not sawn . .	539	11×5½

I entered the 600*l.* in the ordinary way to their debit in the ledger. I do not remember ever having stated that Mr. Hart, Jr., had given the firm a mortgage on the sleepers."

13. It was agreed that the Court should draw any inferences of fact which a jury ought to have drawn.

14. The question for the decision of the Court was, whether, under the circumstances, the plaintiffs were entitled to succeed in the action, in respect of the sleepers and timber seized and taken by the defendants, or either of them.

15. If the Court should be of opinion that the plaintiffs were entitled to succeed in respect of both or either of the said claims, judgment was to be entered up for the plaintiffs for a sum to be agreed upon by the parties, or, in case of their difference, to be settled by the Master, together with costs of suit.

16. If the Court should be of opinion that the plaintiffs were not entitled to succeed in the action, judgment was to be given for the defendants, with costs.

*324] *Field*, Q. C. (with whom was *A. Wills*), for the plaintiffs.—The question is, whether the sleepers or the unsawn timber, the subject of this action, passed to the defendants under the circumstances stated in the case. [WILLES, J.—Or, rather, whether the defendants are to lose the goods and their price.] By the original contract, it is clear that no property passed to the purchasers until the timbers had been sawn into sleepers by the vendors, and delivered at the purchasers' wharf. If the timber or the sleepers had been destroyed by fire whilst upon the premises of the vendors, the purchasers could not have been charged, neither would the vendors have been absolved from delivering other sleepers pursuant to their contract. [*Keane*, Q. C., contrà, assented to this. ERLE, C. J.—The question is, whether by the transaction of the 19th of December, 1863, the goods did not become a pledge or security for the 600*l.* advanced.] What passed upon that occasion, it is submitted, did not convey the property, or give the defendants any equitable claim upon it: all it amounted to, was, a prepayment on account of the contract. [ERLE, C. J.—Was it not an agreement that the property should stand charged with the sum advanced?] To operate as a valid charge, there must be a contract of hypothecation or mortgage. [WILLES, J. —Or a pledge.] To enure as a pledge, there must be a change of possession. [WILLES, J.—It has been held that there may be a pledge without actual possession: Reeves *v.* Capper, 5 N. C. 136, 6 Scott 877; Martin *v.* Reid, 11 C. B. N. S. 730.] There must be some positive contract that the timber was to become thenceforth the property of Messrs. Waring, in consideration of a prepayment of 600*l.* Of that there is no evidence whatever. There was not even an appropriation of the cargo by the vendors and an assent thereto

*325] by the purchasers: the *property remained just where it was. It cannot be denied that it was the intention of Hollway, Hart & Co. to appropriate the particular timber to the formation of sleepers to satisfy their contract with Messrs. Waring. But, until it had been specifically appropriated, and sawn, and delivered at their wharf, there was nothing done which bound Hollway, Hart and Co. to deliver or Messrs. Waring to receive these particular goods. [WILLES, J.—When was the timber cut into sleepers?] The timber arrived at the wharf of the bankrupts on the 14th of December: it does not appear when it was cut into sleepers. [ERLE, C. J., referred to Mogg

v. Baker, 3 M. & W. 195.†] There, A. agreed to assign to B. certain specific goods by way of security for money advanced by B. for the purchase of them, and afterwards, in pursuance of such agreement, actually assigned them: and it was held, that, although the assignment itself was made under such circumstances as would have rendered it void under the Insolvent Debtors Act (7 G. 4, c. 57), and A. subsequently took the benefit of that Act, his assignees were not entitled to the goods. The transaction there was of a totally different character from this. There, Baker had no interest in the goods: he was under no liability to pay. What he said, was, I will assist you to get the furniture, if you will give me a security upon it. The advance was made upon that specific security. [WILLES, J.—There is a recent case in the House of Lords where this matter was very fully gone into.] That was a case of Holroyd *v.* Marshall, 33 Law J., Chan. 193. There, A. by deed assigned to B. all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was thereby provided that all the machinery which during the continuance of the security should be fixed or placed in the mill in addition to or in substitution for the former machinery, should be *subject to the trusts of the assignment, and A. [*326 undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and, after the date of it, A. placed other machinery in the mill in addition to that which was there at the date of the assignment, and gave notice to B. of such substitution and addition. A. continued in possession according to the terms of the assignment. Vice-Chancellor Stuart held, that, *the machinery being in A.'s possession as agent of B.*, B. was entitled, as against a judgment-creditor of A. who had sued out execution against A., to the additional machinery. This decision was reversed by Lord Campbell, C., on the ground of A.'s possession not being sufficient to support B.'s claim, and on the ground, that, to give B. the complete title to the substituted and added machinery, it was necessary that there should be a novus actus interveniens. The House, on appeal, reversed Lord Campbell's judgment, and restored that of Vice-Chancellor Stuart. Lord Westbury, C., in delivering his opinion,—after stating the facts,—said: "The question might be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity, it was not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it was agreed to make a present transfer of property, passed at once the beneficial interest, provided the contract was one of which a Court of equity would decree specific performance." What contract is there here, of which specific performance would be decreed? "In the language of Lord Hardwicke," continues his Lordship, "the vendor became a trustee for the vendee, subject of course to the contract being one to be specifically performed. And this was true, not only of *contracts relating to real estate, but also of contracts [*327 relating to personal property, provided that the latter were such as a Court of equity would direct to be specifically performed. A contract for the sale of goods, as, for example, of five hundred chests of tea, was not a contract which would be specifically per-

formed, because it did not relate to any chests of tea in particular; but a contract to sell the five hundred chests of a particular kind of tea 'which are now in my warehouse in Gloucester,' was a contract relating to specific property, and which would be specifically performed. The buyer might maintain a suit in equity for the delivery of a specific chattel, when it was the subject of a contract, and for an injunction (if necessary), to restrain the seller from delivering it to any other person." Speaking of Mogg *v.* Baker, his Lordship added: "Some use was made at the Bar, and in the Court below, of the language attributed to Mr. Baron Parke, in the case of Mogg *v.* Baker. That learned Judge appeared to have given, not his own opinion, but what he understood would have been the decision of a Court of equity upon the case. He was represented as speaking upon the authority of one of the Judges of the Court of Chancery. Any communication so made was of course extra-judicial: and there was much danger in making communications of such a nature the ground of judicial decision. But what appeared to have been the principle intended to be stated was correct; for, Mr. Baron Parke, speaking of the agreement in the case, said 'It would cover no specific furniture, and would confer no right in equity.' It had been already explained that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest. If, *therefore, the contract in Mogg *v.* Baker related to no specific furniture, it was true that it would not, *at the time of its execution,* confer any right in equity: but it was equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition. Whether a right construction was put upon the agreement in Mogg *v.* Baker was a different question, and one which it was needless to consider, as the proposition stated by the learned Judge was quite consistent with the principles on which this case ought to be decided." [WILLIAMS, J.—I do not see how those principles are to be brought to bear upon this case.] The real question is, whether there is a contract sufficient to pass the property either in the timber or the sleepers. The contract was for a certain number of sleepers. There was no specific appropriation, and no settlement of account. The parties met; prepayment was asked, and 600*l.* was advanced to the sellers in part payment of a sum which it was believed would become due from the buyers. Was that enough to give the latter a right to any specific timber or any specific sleepers? Clearly it was not. [WILLIAMS, J.—Suppose the bankrupts had said to Eckersley, "If you will give us an advance of 600*l.*, we agree to appropriate to you those sleepers or this timber,"—would not equity consider that done which ought to have been done?] If there be a specific charge, it ought to be made out by clear and unambiguous language. Why should the defendants have exhibited so much anxiety for the delivery of the cargo, if they had a present security or charge upon it for their advance? [KEATING, J.—Hart's original application was, to have an advance "on account of the cargo now

*328]

in."] That would not constitute a charge upon it, or anything of which a Court of equity would decree specific performance.

Keane, Q. C., contrà, was not called upon.

[*329 ERLE, C. J.—I think our judgment in this case ought to be for the defendants. The action is brought by the plaintiffs as assignees of Messrs. Hollway, Hart & Co., bankrupts, to recover the value of certain timber and sleepers alleged to have been wrongfully converted by the defendants. It appears that early in 1863, the bankrupts entered into a contract to deliver a certain number of railway sleepers to Messrs. Waring, the defendants, and in performance of that contract delivered to them a considerable number, which were duly paid for. At last came the cargo upon which this question arises. The timber arrived from Dantzic at the wharf of the bankrupts on the 14th of December. It consisted of timbers of such length that when sawn asunder each would make two sleepers. On the 16th of December, John Hart, one of the bankrupts, called at the office of the defendants, and asked Annett, their clerk, if the firm would oblige him with a check for 600*l.* "on account of the cargo of sleepers now in," telling him that the whole lot, when sawn and delivered, would come to between 800*l.* and 900*l.* My judgment rests entirely upon what passed at the time that advance was made. It was agreed on all hands that it was an advance made specially on account of the timber in question. The assignees now claim to keep both the money and the goods. The question is, whether, as against them, what passed between the defendants and John Hart at the time of making that advance did not constitute that 600*l.* a charge upon the timber, and made it an advance upon the security of that specific cargo, so as to prevent the assignees, who take all the legal and equitable rights of the bankrupts, from being entitled to claim it. I am of opinion that what passed upon that occasion did *amount to an agree- [*330 ment on the part of John Hart to appropriate this particular timber as a security for the advance he was asking. The argument on the part of the assignees in substance is, that this was a loan upon the personal security of John Hart. If that had been the intention of the parties, why should any reference have been made to the cargo of timber then at the wharf of the bankrupts? Judging of the transaction with the ordinary prudence of men of business, it is impossible to imagine that the defendants intended to advance, or that Hart hoped to obtain, the 600*l.* without the security of the timber. Upon every occasion that the money was spoken of,—as appears by the examinations of Eckersley and Annett,—it was spoken of as an advance to be made on account of the cargo of sleepers then arrived. If there had remained nothing to be done to the timber before delivery, the property in it would have passed at once. The only question is, whether the circumstance of its remaining in the possession of the seller for the purpose of being sawn asunder before actual delivery, negatives the defendants' claim. I am of opinion that it does not. Martin *v.* Reid, 11 C. B. N. S. 730, is a distinct authority to show, that, if it was the intention of the parties that the property should be charged, the circumstance of its remaining in the hands of the person to whom the advance is made will not prevent that intention from having that effect. I am there reported to have said, in giving judgment,—"The question is, whether, as between these parties, the words used constitute the

mises of Martin the premises of Bower for this purpose. I am clearly of opinion that the intention of the parties will be carried out by holding them to be so. It has over and over again been decided that the words of an agreement are to have effect according to the mind and
*331] intention of the parties. Thus, a *delivery of goods in satisfaction of a debt has been held to amount to payment: see Cannan v. Wood, 2 M. & W. 465.† So, where goods have been purchased and left in the possession of the vendor for a special purpose of the vendee, that has been held to amount to a delivery: Elmore v. Stone, 1 Taunt. 458. So, where a horse was sold, but left in the stable of the seller, being only removed to another stall, that was held to amount as between the buyer and the seller to a delivery. And in many instances the warehouse of the vendor has been held to be the warehouse of the purchaser, in order to carry out the intention of the parties." That clearly was the intention of the parties here. I am therefore of opinion that the defendants are entitled to retain the goods.

WILLIAMS, J.—I am of the same opinion. Upon this special case we are to draw inferences of fact such as a jury would be warranted in drawing. From the facts stated, the only inference I can draw, is, that there was an agreement between the contracting parties that the cargo of timber then at the wharf of the bankrupts was to be specially appropriated as a security for the 600*l.* advanced. If so, it would constitute a charge in equity, and the timber would not upon the bankruptcy of the sellers pass to their assignees so as to entitle them to maintain this action.

WILLES, J.—I am of the same opinion. This action is founded upon property. The question before us is, whether upon the advance of the 600*l.* to John Hart, there was a contract between him and the defendants that these particular goods should stand as a security for that sum. That is a question of fact, upon which I can come to no other conclusion than in the affirmative.

*332] *KEATING, J.—I am of the same opinion. It was manifestly intended by all parties that the cargo of timber in question should be a security for the 600*l.* It is clear, then, that the assignees could not be entitled to it discharged of the defendants' claim.

Judgment for the defendants.

HODGSON v. MOULSON. *Jan.* 18.

By a mining lease, the lessees covenanted, amongst other things, that they would "from time to time and at all times during the said term work the said pits, mines, and shafts in a workmanlike manner, and *leave pillars of the said stone of sufficient strength to support the roofs of the said mines*, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, and at the expiration of the term to fill up the pits and shafts, and restore the surface to a state fit for agricultural purposes.

Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines,—notwithstanding they might have worked the mines in an usual and a workmanlike manner.

THE following case was stated (without pleadings) for the opinion of the Court:—

1. By indenture of lease, bearing date the 1st of December, 1853, John Bower granted and demised to the defendant and others for a term of twelve years from the 1st of July then last past, all the stone, slate, and flag lying and being in and under a certain part of certain closes of land situate at Legrams, in the township of Horton, in the parish of Bradford, in the county of York, with full and free liberty, power, and authority for the lesses and their and every of their agents, servants, and workmen, at all times during the continuance of the said demise, at their own costs, charges, and expenses, to enter into and upon the said thereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get, and work the said stone, and for that purpose to sink such pits and shafts, and set up such engines, *whimsies, cranks, gins, and other machinery, and to make use of such devices, ways, and means as should be found necessary or expedient for working, raising, and getting the said stone in the best manner, or as had been usually practised in such cases in the township of Clayton, in the parish of Bradford aforesaid; and each of the said lessees in and by the said indenture of lease, a copy whereof was annexed to and was to be taken as part of the case,(a) thereby for [*333

(a) The indenture was dated the 1st of December, 1853, and was made between John Bower (through whom the plaintiff claimed) of the one part, and Miles Moulson, John Moulson, William Moulson, and David Moulson (the defendant) of the other part. It recited that the Moulsons had agreed with Bower to grant to them a lease of "the stone now lying and being within and under such part or parts of the closes of land hereinafter mentioned, as are hereinafter particularly described;" and that the stone under certain other parts of the said closes of land had been already partly wrought, gotten, and disposed of. It then witnessed, that, in consideration of the premises, and of the rents, payments, covenants, and agreements thereinafter reserved and contained, &c., Bower granted, demised, and leased unto the Moulsons, their executors, &c., all the stone, slate, and flag lying and being in and under the surface of such part or parts of certain closes of land situate, &c., belonging to the said John Bower, and now occupied by John Diggles as his tenant, and which part or parts is or are more particularly described in the plan or ground-plot drawn upon those presents, and therein coloured green, and containing by admeasurement 14,520 square yards, with full and free liberty, power, and authority for the lessees, their executors, &c., and their and every of their agents, servants, and workmen, at all times during the continuance of this demise, at their own costs, charges, and expenses, to enter into and upon the said hereby demised premises, or any part thereof, and there to dig, bore, delve, sink for, raise, get, and work the said stone, and for that purpose to sink such pits and shafts and set up such engines, whimsies, cranks, gins, and other machinery, and to make use of such devices, ways, and means as shall be found necessary or expedient for working, raising, and getting the said stone *in the best manner, or as is usually practised in such cases in the township of Clayton*, in the parish of Bradford aforesaid, and to occupy from time to time so much of the said demised premises as may be necessary for placing, laying up, and dressing such stone, and for laying and stacking up the spoil or rubbish to be raised out of the said pits or shafts, and from time to time to take down the said engines, whimsies, cranks, gins, and other machines erected and set up for the purposes aforesaid, and the materials thereof, as to them the lessees, their executors, &c., shall seem meet, and to re-erect them on other parts of the said hereby demised premises; and to have, take, and carry away at their own free will and pleasure, and to convert for and to their own proper use and benefit all such stone as shall be gotten or raised from the said pits and shafts:" with liberty to use all ways, watercourses, &c. Habendum for twelve years from the 1st of July then last, but determinable nevertheless as thereinafter mentioned: Yielding and paying therefore during the said term unto the lessor, his heirs and assigns, 2*s.* 6*d.* per superficial square yard, to be paid as a yearly rent, in two equal half-yearly payments, on the 1st of January and 1st of July in every year, and in no half-year to be less than 75*l.* 12*s.* 6*d.* (whether stone to that amount shall have been gotten or not), or such greater sum, after the rate of 2*s.* 6*d.* for each superficial square yard of stone which shall have been gotten during each half-year as may on an admeasurement thereof be found to be due. Then followed covenants by the lessees to pay rent and taxes, and from time to time and at all times during the term thereby granted to fence off the pits or shafts to be sunk in the demised premises, and also such portion of the same as should

*334] himself *covenanted with the said John Bower, his heirs and assigns, that they the said lessees should and would from time to time and at all times during the said term work the said pits, mines, and shafts in a workmanlike manner, and leave pillars of the *335] solid stone of *sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same was then done in other works of like character in Clayton aforesaid, and should and would on the expiration or other *336] *sooner determination of the said term (amongst other things) remove all the stone, spoil, or rubbish which should have been brought out of the said pits or shafts and convert the land which should have been used by them for any of the purposes in the said lease into good arable land, or, in default thereof, should and would pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of 100*l.* for every acre, and so in proportion for every quarter or less quantity than an acre, of such land not converted into arable land, as and for liquidated damages.

2. By another indenture of lease, dated the 11th of December, 1857, the said John Bower granted and demised to the defendant and the said other lessees, for a term of ten years from the 1st of January then

be occupied by them for the purposes aforesaid, and to keep the fences and gates in repair. Then followed the covenant upon which the action was founded: "And also shall and will from time to time and at all times during the said term work the said pits, mines, and shafts in a workmanlike manner, and leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton aforesaid." And also shall and will from time to time, on demand, pay to the occupier or occupiers for the time being of the said closes of land double the amount of rent paid by such occupier or occupiers for such portion of the surface of the said closes of land as they may use for the purpose of getting or working the stone, or for laying and stacking up the spoil or rubbish to be raised out of the said pits or shafts, and also reasonable satisfaction for any damage that may be committed or occasioned on the adjoining lands or the crops respectively growing thereon; and also make satisfaction to such occupier or occupiers for the time being as aforesaid for any damage which he or they may sustain by reason of his or their horses or other cattle receiving any damage by falling into any of the quarries, works, shafts, or pits to be made in the working of the said stone hereby demised, through the insufficiency of the fences thereof, or by leaving open any gate or gates, or by or through any other default or neglect of the said lessees, their executors, administrators, and assigns. Then followed a covenant on the part of the lessees not to grant, demise, let, assign, or set over or otherwise part with the stone or privileges thereby granted, or their estate, term, or interest in the same, without the consent in writing of the lessor, his heirs or assigns.

The reddendum was as follows,—"And also shall and will, on the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender, and yield up the same premises unto the said John Bower, his heirs and assigns, and, within two months after the expiration or other sooner determination of the said term, fill up the said pits and shafts, and remove and take up all engines, whimsies, cranks, gins, machines, and other erections which shall have been made or erected during the said term for the purpose of getting the said stone, and remove all the stone, spoil, or rubbish which shall have been brought out of the said pits or shafts, and convert the land which shall have been used by them for any of the purposes aforesaid into good arable land, or, in default thereof, shall and will pay or cause to be paid unto the said John Bower, his heirs or assigns, the sum of 100*l.* for every acre, and so in proportion for every quarter or less quantity than an acre of such land not converted into arable land, as and for liquidated damages."

Then followed a power for the lessor to enter to view the condition of the mines, powers of distress and re-entry on non-payment of the rent and royalties or non-performance of the covenants, or in case of the bankruptcy of the lessees; and also a proviso for cesser of the term in case all the stone should be paid for and gotten and cleared off by the lessees before the expiration of twelve years, a covenant for quiet enjoyment by the lessees, and a proviso for reference of disputes to arbitration.

next, *all the residue of the stone, slate, and flag lying and being within and under the said closes respectively, with the same liberties and powers, and subject to the same covenants on the part of each of the said lessees as are contained in the said indenture of lease first above mentioned. [*337

3. By indenture of grant and release dated the 13th of January, 1858, the said John Bower (being then seised in his demesne as of fee of and in the said closes of land in the said indentures of lease respectively mentioned, subject to the said estates and interests therein of the said lessees in and by the said indentures of lease respectively created) conveyed all his the said John Bower's said estate and interest of and in the said closes of land respectively to the plaintiff, who from that time until the commencement of this suit has continuously occupied the said closes respectively.

4. The said closes contained two beds or strata of stone,—one near to the surface, called the top stone,—and the other about thirty yards below the surface, called the bottom stone; the intervening soil between the said two beds or strata being of the depth of twenty yards or thereabouts. The top stone could not be got without removing the soil over it: but the bottom stone could be got without removing the soil intervening between the two beds or strata.

5. Prior to the granting of either of the said indentures of lease, the top stone under certain parts of the said closes had, to the knowledge of the said parties to the said leases, been quarried and worked out to the depth of thirty feet or thereabouts from such parts of the surface of the said closes respectively as are hereinafter stated to have subsided, cracked, and given way, as hereinafter mentioned; and the surface of the said parts of the said closes respectively was *afterwards and before the granting of the said indentures of lease respectively, or either of them, levelled, trenched, and restored, so as to render it fit for agricultural purposes, for which it had been used for upwards of forty years next before the said top stone was so quarried and worked out as aforesaid; and for which uses it has been used ever since the same was so levelled, trenched, and restored as aforesaid. [*338

6. After the execution of the said indentures of lease respectively, the said lessees entered upon the said demised premises, and there sunk pits and shafts, and worked the said mines in a workmanlike manner, and got and cleared thereout large quantities of the said stone so granted and demised as aforesaid, in the usual and best way in which stone was at the times of the granting of the said indentures of lease respectively got and cleared in works of a like character in the township of Clayton aforesaid; and, *in so getting and clearing the said stone as last aforesaid, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purposes of working the said mines themselves in a thorough and efficient manner, but neglected and omitted to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as to prevent the subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively*, which are hereinafter stated to have subsided, cracked, and given way, as hereinafter mentioned.

7. Previously to the commencement of this suit, divers parts of the surface of the said closes respectively had subsided, cracked, and given way, in such a manner and to such an extent as to materially interfere with the beneficial user of the surface of the said parts of the said closes respectively, solely by reason of the said lessees having
*339] so omitted and neglected as *aforesaid to leave any such pillars as aforesaid of sufficient strength to support the roofs of the said mines so as to prevent the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively. In the township of Clayton it is usual to leave pillars of stone, but notwithstanding the roofs of the mines often fall in and the consequence is that a subsidence of the surface-soil in that township often takes place when the bottom stone is being worked.

8. The question for the opinion of the Court is,—whether upon the facts above stated, and regard being had also to the provisions of the said indenture of lease a copy whereof was annexed to the case, the said lessees were bound either by the provisions of the said indentures of lease respectively, or otherwise, to have left pillars of solid stone of sufficient strength to have prevented the said subsidence, cracking, and giving way of the said parts of the surface of the said closes respectively, as above mentioned.

9. If the Court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff for 352*l.* and costs of suit. If the Court should be of opinion in the negative, then judgment of nol-pross., with costs of defence, was to be entered up for the defendant.

Quain, for the plaintiff.(*a*)—The question is, whether the defendant performed the covenant which he *entered into, to "leave pillars of
*340] the solid stone of sufficient strength to support the roofs of the mines," so as to prevent the subsidence of the surface, or whether he satisfied the terms of his contract if he left sufficient for his own working of the mines. It is submitted, that, even without this covenant, the surface being reserved to the owner of the soil, the facts stated in the case give the plaintiff a clear cause of action. [The Court called on

Mellish, Q. C. (with whom was *Kemplay*), for the defendant.(*b*)—The simple question is, whether this covenant requires that the lessees shall leave pillars of stone sufficient to enable them to work the stone properly, or sufficient to prevent the surface being interfered with. The latter clearly could not have been intended. It appears from the special case that the demise embraces two separate strata of stone. The

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the plaintiff is entitled to have pillars of solid stone left in the mine, of sufficient strength absolutely to support the roofs of the mine, and so to prevent the subsidence of the surface:

"2. That he is so entitled by virtue of the express words of the defendant's covenant; and that those words cannot be controlled by any usage or custom."

(*b*) The points marked for argument on the part of the defendant were as follows:—

"1. That, upon the facts stated in the case, and regard being had to the provisions of the leases, the lessees were not bound to have left pillars of solid stone of sufficient strength to have supported the roofs of the mines, so as to have prevented the subsidence, cracking, and giving way of parts of the surface of the closes as stated in the case:

"2. That upon the facts stated in the case, it appears that all was done by or on the part of the lessees, which was necessary according to the terms of the leases; and that the defendant is not liable for the damages arising from the subsidence, cracking, and giving way of the surface of the closes, under the circumstances and in the manner stated in the case."

top stratum could only be quarried: it could not, therefore, have been contemplated that the surface was to be preserved uninjured. The object was, to compel the lessees to work the stone in a proper *manner, so that the lessor might continue it after the expiration of the lease. The power given to the lessee is, to dig, delve, [*341 sink for, and work the said stone, &c., and to make use of such devices, ways, and means as should be found necessary or expedient for working, raising, and getting the said stone in the best manner, or as had been usually practised in such cases in the township of Clayton." And the case expressly finds, that, in the township of Clayton, it is usual to leave pillars of stone, but notwithstanding the roofs of the mines often fall in, and the consequence is that a subsidence of the surface soil in that township often takes place when the bottom stone is being worked.

Quain, in reply.—The covenant in question only has reference to the lower stratum. The lease contemplated the working out by the lessees of the whole of the stone; it never could be intended that the lessees should be at liberty to let down the soil. And it was evidently the intention of the parties that the whole of the stone should be worked out by the lessees; for, it provides, that, within two months after the expiration or other sooner determination of the term thereby granted, the lessees shall fill up the pits and shafts, and remove and take up all engines, whimsies, cranks, and other erections made or erected during the term for the purpose of working the said stone, &c., and remove all the rubbish, &c. [WILLES J.—There is no proviso to protect the lessor against the sinking of the surface, unless this does it.] None.

ERLE, C. J.—This is an action for breach of a covenant contained in a mining lease, to leave pillars of the solid stone of sufficient strength to support the roofs of the said mines, whereby damage was done to the surface of the land: and the question which has *been argued before us, is, whether that covenant extends to compel the [*342 lessees to leave pillars of stone sufficient to prevent the subsidence of the surface, or is limited to such as might be sufficient to enable the lessees to work the mines in a proper, usual, and efficient manner. I am of opinion that it amounts to a covenant to leave pillars which shall be sufficient to support the roofs so as to prevent the sinking or subsiding of the surface. The indenture purports to be a demise of "all the stone, slate, or flag lying and being in and under the surface," &c. It clearly contemplates that the lessees will remove the whole of the stone, &c., during the term. Further there is a proviso for the determination of the lease when all the stone is exhausted. The whole frame of the instrument negatives the notion that the pillars were to be left in order that the lessor might continue the working of the mines, if the lessees gave them up before they were worked out. Why, then, should the lessor stipulate for pillars to be left to support the roofs? I see no reason, unless it be that the surface might be protected from subsidence. I am fortified in this construction by the part of the lease in which this covenant is found, and also by the covenant for filling up the pits and shafts and removing the engines and machinery, &c., and paying compensation for damage done to the surface when all the

working shall have been discontinued. But there is no provision for indemnifying the lessor against injury to the surface by the falling in of the mines, unless it is provided for by this covenant. The injury is of a serious character, for the damage is estimated at 352*l.*, and therefore it would naturally be provided for. Upon the whole, I have come to the conclusion that the lessees did bind themselves to get and to pay for the whole of the stone, and having done so, to restore the surface of the land to a fit state to be used for agricultural purposes.

*343] *WILLIAMS, J.—I am of the same opinion. I must say I was much struck by the observation of Mr. *Mellish*, that the covenant in question is found amongst those which relate to the working of the mines in a proper manner, and therefore would seem more naturally to belong to the substrata, and not to the superincumbent surface. The case finds, that, in getting and clearing the stone, the lessees left pillars of the solid stone of sufficient strength to support the roofs of the said mines so far as was requisite for the purposes of working the said mines themselves in a thorough and efficient manner. It would seem, therefore, that they have done everything that could be required of them, provided the covenant is to be construed in the limited sense suggested by Mr. *Mellish*. But, for the reasons pointed out by my Lord, I have, though not without some hesitation, come to the conclusion that the covenant has been broken.

WILLES, J.—I am of the same opinion. During Mr. *Mellish's* argument, I was inclined to take the same view as my Brother Williams at first took: but Mr. *Quain's* reply has satisfied me that the larger construction for which he has contended is that which we ought to put upon this covenant. It is to be observed that it is found amongst covenants which are framed carefully for the protection of the occupiers of the surface, requiring the lessees, when the mines are no longer worked, to fill up the pits and shafts, and to remove all encumbrances from the soil, so as to render it fit for being used for agricultural purposes. As the covenant is general in its terms, it must be construed generally. The lessor is not entitled to have the land restored to him with the surface intact: but he is entitled to have pillars of stone left of strength sufficient to sustain the roofs and to prevent the surface being rendered useless to him by subsidence.

*344] *KEATING, J.—I am of the same opinion. It was the clear intention of the contracting parties that sufficient pillars of stone should be left to protect the surface from the effects of subsidence. Mr. *Mellish's* construction would entirely deprive the lessor of the advantage of a covenant which was evidently inserted for his exclusive benefit. He says the object was that the mines should be left in such a state that the lessor might continue to work them if he thought fit. Mr. *Quain* effectually answered that by showing that by the terms of the lease the whole of the stone was to be worked out by the lessees, and the pits and shafts to be filled up, and all obstructions removed from the surface. The intention of the covenant was, that the suface should be protected from being destroyed by the total removal of its natural support; and that covenant has clearly been violated by the defendant. Judgment for the plaintiff.

CHARLES STACEY, Appellant; THOMAS TEECE WHITEHURST, Respondent. *Jan.* 25.

A. and B. were passing in a trap along a highway. A. alighted, and with a dog and gun entered a field where he had no right to go, and there shot a hare, which he brought to the trap and handed to B. Both then departed:—Held, that, upon this state of facts, the justices would be justified in inferring that both were engaged in the commission of a common offence; and that, one having been convicted for trespassing in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, the other might have been convicted under the 11 & 12 Vict. c. 43, s. 5, for aiding and abetting his companion; or that both might have been convicted, upon an information properly framed, of a joint trespass under the former Act.

THIS was a case stated by justices for the opinion of the Court under the 20 & 21 Vict. c. 43.

At a petty session holden at Cruckton in and for the division of Ford, in the county of Salop, on the 28th of October, 1864, an information preferred by Charles *Stacey (hereinafter called the [*345 appellant) against Thomas Teece Whitehurst (hereinafter called the respondent), under s. 5 of the 11 & 12 Vict. c. 43, charging for "that John Whitehurst, on the 11th of October, 1864, at the parish of Pontesbury, in the county aforesaid, did unlawfully commit a certain trespass, by entering and being in the daytime of the same day upon a certain piece of land in the possession and occupation of Stephen Jones there in search or pursuit of game, to wit, a hare, there, without the license and consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having any right to authorize the said John Whitehurst to enter or be upon the said land for the purpose aforesaid, contrary to the form of the statute in such case made and provided; and that Thomas Teece Whitehurst, of the Mount Shrewsbury, in the said county, was then and there present aiding and abetting the said John Whitehurst to do and commit the said offence." And upon the hearing the justices dismissed the said information against the said Thomas Teece Whitehurst, upon the grounds hereinafter stated.

The said John Whitehurst was before the hearing of the above information convicted of the trespass, and fined in the penalty of 2*l.* and costs.

Upon the hearing of the information, it was proved on the part of the appellant, that, on the 11th of October, 1864, at the parish of Pontesbury, in the county of Salop, the said John Whitehurst and the respondent were passing along the turnpike-road in a trap, on their way to shoot at the Oaks Farm, belonging to their sister, and when near the Lea Cross, in the said parish of Pontesbury, the trap, which was driven by the said Thomas Teece Whitehurst, was stopped, and the said John Whitehurst got out of the trap, and entered a *field [*346 in the occupation of Stephen Jones, with a gun and dog, and shot a hare, which he picked up, and, on returning into the turnpike-road (where the trap had stopped for a minute or so), gave the hare to the respondent, according to the evidence of two witnesses at the distance of a hundred yards and a quarter of a mile respectively; and that the respondent then drove on along the road, and the said John

Whitehurst walked about five or six yards behind the trap, to the public-house at Lea Cross.

It was contended, on the part of the respondent, that he was not an aider and abetter in the trespass, inasmuch as he was passing along the turnpike-road for a lawful purpose, on his way to shoot on his sister's farm at the Oaks (which was not denied or questioned); and that he was not there for the purpose of aiding and abetting in the commission of the trespass; that, not having left the trap, he could not be an aider and abetter; and that, so soon as the said John Whitehurst returned into the said turnpike-road, the trespass had been committed and completed.

The justices, being doubtful whether upon the evidence given before them the respondent was in law an aider and abetter, thought it right to dismiss the case as against the said respondent Thomas Teece Whitehurst.

The depositions, which accompanied and were to be taken as part of the case, were as follows:—

"Cruckton, 28th October, 1864.

"Depositions taken before H. Sanford, Esq., and F. Harris, Esq.

"Charles Stacey
v.
John Whitehurst. } Trespass. Game.

"Isaac Gittins Baldwin, sworn, saith,—I am the son of Mr. Bald-
*347] win. I recollect the 11th of October *last. I was brushing a hedge in the locality of the Lea Cross school. I saw two gentlemen come up in a trap, and saw the gig stop in the road. I saw one of the two get out of the trap. He had a gun in his hand, and a dog followed him: it was something of a pointer or a retriever. He went into Mr. Jones's Crab Tree leasow. He went about one hundred yards, a little further down the field. He shot a hare. He went and picked it up, and returned into the road with the hare. I heard one of them say 'It's a fine hare.' The one who shot the hare then walked up the road to the public-house, Mr. Hudson's of the Lea Cross.

"Cross-examined,—I was about a hundred yards off when he gave it to the other man in the trap. I have seen a hare before, many a one. The gig stopped. I did not know any of the parties.

"H. D. Warter, Esq. I have the right of sporting over Mr. Jones's ground at the Lea. Mr. Jones has no right to shoot there.

"David Jones,—I live at the Lea Cross, and am a blacksmith. I remember the 11th of October last. I heard the report of a gun, and saw a man in a field of Mr. Stephen Jones's. The man had a gun and a dog with him. I saw the dog catch a hare. I saw the man take the hare off the dog, and walk back to the road. He came up the road to Mr. Hudson's public-house. Mr. Whitehurst was the person who came out of the field.

"Cross-examined. I was in my shop. It might be a quarter of a mile off. The one walked behind the carriage,—about five or six yards behind.

"John Hudson,—On the 11th of October last, from half-past eight to nine, John and Teece Whitehurst came to my house at the Lea Cross. Mr. Teece Whitehurst was in a phaeton. I went to him and

spoke to *him, and then Mr. John Whitehurst came from the back of the house. There was a dog there, a pointer, a game dog. I saw a gun in the trap: it was out of the bag. The butt-end of the gun was hanging over the side of the trap. John Whitehurst said, 'Anything that comes to our net will be fish to day.' [*348

"Isaac Gittins Baldwin, recalled,—I saw the one who shot the hare give it to the one in the trap. I saw the trap go the whole of the distance from where the shot was fired to the public-house."

[Here followed a note of the fine and expenses.]

"Charles Stacey
v.
"Thomas Teece Whitehurst. } Game trespass. Aiding and abetting.

"Isaac Gittins Baldwin,—On the 11th of October, 1864, I saw a person remain in the trap. The man who shot the hare on Mr. Jones's land at the parish of Pontesbury gave it to the one in the trap. The trap was standing at the time the hare was given to him. I was about one hundred yards off. The trap stopped opposite Mr. Jones's gate. The dog caught the hare. The man who shot the hare gave it to the other man in the trap.

"David Jones,—On the 11th October, I saw a person going along in a trap. It was Mr. Whitehurst. I don't know his Christian name. I saw a man in a field take a hare from a dog. That same person walked up the road with the trap, not in the trap. I never lost sight of him till he got to the Lea Cross. The trap stopped opposite Mr. Jones's field for a minute or so. The gig was stopped there before the man came from the field.

"John Hudson,—On the 11th of October, between half-past eight and nine o'clock, two persons arrived at my house. John Whitehurst came from behind the house. Teece was in the trap, and getting out. I am *not aware of any other two persons stopping at my house with a trap that morning. [*349

"Dismissed, on the ground that Mr. Thomas Teece Whitehurst was not in law aiding and betting in the trespass."

The questions of law arising on the above statement for the opinion of the Court were,—first, whether the said Thomas Teece Whitehurst was an aider and abetter in the commission of the trespass, within the meaning of the 11 & 12 Vict. c. 43, s. 5,—secondly, whether the said dismissal was valid or otherwise: and the Court was prayed to remit the case to the justices with its opinion thereon, or to make such other order as to the Court might seem fit.

H. James, for the appellant, was stopped by the Court.(*a*)

Raymond, for the respondent.(*b*)—The offence charged in this information is one created by the 30th section of the statute 1 & 2 W. 4, c. 32, which, after reciting that, "after the commencement of this Act, game will become an article which may be legally bought and

(*a*) The points marked for argument on the part of the appellant were as follows:—"That, by the evidence given before the justices, it was proved that the respondent had committed the offence with which he was charged; and that the dismissal of the said charge by the said justices upon the grounds stated by them in the said case was wrong in law."

(*b*) The points marked for argument on the part of the respondent were as follows:—"That, by the evidence given before the justices, it was not proved that the respondent had committed the offence with which he was charged; and that the dismissal of the said charge by the said justices upon the grounds stated by them in the said case was right in law."

*350] sold, and it is therefore just and reasonable to provide *some more summary means than now by law exist for protecting the same from trespassers," enacts, that, "if any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land, in search or pursuit of game or woodcocks, &c., such person shall, on conviction thereof before a justice of the peace, forfeit and pay" not exceeding 2*l.* and costs: "Provided always that any person charged with any such trespass, shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." There cannot be such thing as an aider and abetter under this statute: and the evidence shows that there was no complicity between the two Whitehursts until after the shooting of the hare. [Erle, C. J.—The last point is not a very sperate one. The question is, were the two acting in the furtherance of a common purpose. If so, in an ordinary case, the respondent would be an aider and abetter.] If this respondent would not have been liable to an action of trespass upon the evidence given here, he is not chargeable under the statute. In The Queen *v.* Scotten, 5 Q. B. 493, the evidence was much stronger than in the present case. There the party did not himself go upon the land, but was in an adjoining close, employing, assisting, and in company with those who actually entered; and the Court of Queen's Bench doubted whether he could be convicted of entering or being upon land for the purpose of poaching, under the 9 G. 4, c. 69, s. 9, or the 1 & 2 W. 4, c. 32, s. 30. And in The Queen *v.* Pratt, Dears. & P. C. C. 502, 24 Law J. M. C. 113, it was held, that, to shoot at a bird on the land of another, the party firing being at the time on the highway (or on his own land, or the land of a third person), though an actionable trespass, is not an offence *351] within this statute.(*a*) *The conviction proceeds upon the 5th section of the 11 & 12 Vict. c. 43, which enacts that "every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough, or place where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed."(*b*) It is said that this statute creates an offence. That, however, is a fallacy. It is merely addressed to the difficulty that formerly you could not have convicted an accessary until you had convicted the original offender. [Willes, J.—This is purely a question of pleading. It is, in effect, a question whether this information with the facts stated in the depositions would make a good count in an indictment if it were

(*a*) In Osmond, app., Meadows, resp., 13 C. B. N. S. 10 (E. C. L. R vol. 106), A., being upon his own land (or land upon which he was privileged to shoot), fired at and killed a pheasant in the land of B., and went upon B.'s land (without leave) and picked it up: and it was held that this was a trespass "in search or pursuit of game," within the 1 & 2 W. 4, c. 32, s. 30,—the whole being one continuous act.

(*b*) As to what is an "aiding and abetting" within this statute, see Howells, app., Wynne, resp., 15 C. B. N. S. 3 (E. C. L. R. vol. 109).

an indictable offence, or in a declaration if it were an actionable matter. Pleading evidence is objectionable, unless the evidence is conclusive. But, is there not the most conclusive evidence here of a trespass by the respondent? I think you must contend that this does not amount to an averment that he did trespass in pursuit of game.] *There is no evidence of a trespass committed by this respondent. He never left the trap. And it is perfectly consistent with all the evidence, that he was ignorant of the intention of his companion until after the offence had been committed. [*352

ERLE, C. J.—It is not for the Court to draw inferences from the facts: but I think the case should be sent back to the magistrates with an intimation of our opinion that the facts were in our judgment sufficient to warrant them in inferring that the respondent was guilty of the offence he was charged with. The question of law submitted to us I take to be, whether or not there was any evidence which would justify the magistrates in finding that the respondent had been guilty of a trespass. I think there was abundant evidence for that purpose. I do not say that they were bound in law to convict; but I think the matter should go back to them in order that they may if they choose draw an inference unfavourable to the respondent. The short facts are, that two persons were passing along the turnpike road in a trap, and one of them got out, and went into the field with a dog and a gun, and shot a hare, and picked it up and brought it to his companion, who had remained in the trap. If the magistrates find that these two persons were engaged in one common purpose,—the one shooting, the other watching,—the latter would clearly be aiding and abetting the former in the commission of the offence, and both might be found guilty. The evidence was pregnant to a strong degree that the two were acting in furtherance of a common purpose. It has been ingeniously argued by Mr. *Raymond*, that the statute of 11 & 12 Vict. c. 43, s. 5, does not create a new offence, but merely a new mode of proceeding. But I am clearly of opinion that there was abundant ground *to warrant the magistrates in inferring that the respondent was jointly guilty of the trespass in pursuit of game with the man who fired the shot. [*353

WILLIAMS J.—I am of the same opinion. The magistrates seem to have come to the conclusion that there was no evidence to justify them in inferring that the respondent was a party to the trespass committed by his brother. But I think there was abundant evidence that he was there abiding and abetting him in the commission of the offence, so as to bring him within the definition in 1 Russell on Crimes, 3d edit. 26.(*a*) In trespass, all who act in concert are principals.

(*a*) The rule there laid down is as follows:—"Where two or more are to be brought to justice for one and the same felony, they are considered in the light either,—1. of principals in the first degree,—2. principals in the second degree,—3. accessaries before the fact,—or 4. accessaries after the fact. And in either of these characters they will be *felons* in consideration of law; for, he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime.

"I. Principals in the first degree are those who have *actually and with their own hands committed the fact;* and it does not appear necessary to say anything in this case by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

"II. Principals in the second degree are those who were *present, aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accom-

There was abundant evidence on the face of the depositions here that the respondent was aiding in the capture of the hare. And it was not the less evidence of aiding and abetting, because it might have justified his conviction as a principal offender.

Willes, J.—I am of the same opinion. As to the statute 11 & 12 Vict. c. 43, s. 5, I agree with my Lord *that it is unnecessary to refer to it. Mr. *Raymond* points out that the statute was not intended to create a new offence, but merely to facilitate the remedy against persons aiding and abetting an offender. It can only be necessary to have recourse to it where the law draws a distinction between principals in the first degree, principals in the second degree, and accessaries,—the latter being persons who aid or abet the principal offender in the commission of the offence, before or after. In cases of treason,(a) and in offences which are less than felony, every one who in cases of felony would be a principal in the second degree, or an accessary is a principal. That brings me to the second point,—that the information is wrong because it treats Thomas Teece Whitehurst as an accessary. I agree that it would have been better to have treated him as a principal; and doubtless the information could not be sustained without proving him to have been a principal offender. If the statement therein does not amount to that, the information would be bad. But I am of opinion that it does require the justices to draw such a conclusion from the facts as to show that, if this had been a case of felony, the now respondent would have been an accessary, and therefore that he was a principal in the milder offence, in which the distinction is not known. It is in all cases sufficient to describe the matter of complaint or the offence in language which if proved as alleged leads to the inevitable conclusion that the cause of action existed or that the offence has been committed. That was the substance of the decision of the Exchequer Chamber in the fishery case of Halford *v.* Bailey, 13 Q. B. 426 (E. C. L.

*355]

plices; but the latter appellation will not serve as a term of definition, as it includes all the participes criminis, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact. The distinction between principals in the first and principals in the second degree, or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law, who considered the persons present aiding and abetting in no other light than as *accessaries at the fact*. But, as such accessaries, they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And, with a view to obviate this mischief, the Judges by degrees adopted a different rule; and at length it became settled law that all those who are present aiding and abetting when a felony is committed, are principals in the second degree.

"In order to render a person a principal in the second degree, or an aider and abetter, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence. So that, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for, it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise."

(a) "It seems to have been always an uncontroverted maxim, that there can be no accessaries in high treason or trespass." Hawk. P. C., Vol. 2, ch. xxix, p. 437.

R. vol. 66). It simply comes to the question whether there was *evidence here of a joint trespass by the two Whitehursts,—not merely that they were plotting together, but that the trespass was committed for their joint benefit, or by means of their joint action. This doctrine is well illustrated by Lord Coke in the 4th Inst. c. 73, p. 317, treating of the Courts of the Forests, where he says: "And because it would be hard and difficult that any man should hunt and kill the King's deer in his forest, and pass away without discovery, unless there were procurers, plotters, assisters, and receivers, by the law of the forest, whosoever receiveth within the forest any such malefactor either in hunting or killing, knowing him to be such a malefactor, or any flesh of the King's venison, knowing it to be the King's,—in this case he is a principal trespasser, wherein the law of the forest differeth from the common law; for, by the common law, he that receiveth a trespasser(a) and agreeth to a trespasse after it be done, is no trespasser, unless the trespasse was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for, in that case, Omnis ratihabitio retrotrahitur et mandato æquiparatur: but, by the law of the forest, such a receiver is a principal trespasser, though the trespasse was not done to his use, as well as the procurers and plotters: but, by the common law, in case of felony, such a receiver is but an accessary." For these reasons, I agree with the rest of the Court that the evidence in this case would have fully warranted the justices in finding that the respondent was guilty of the trespass, and might, if so minded, have convicted him upon this information. [*356

KEATING, J.—I am of the same opinion. The difficulty which the magistrates seem to have felt, was, whether, the respondent not having left the vehicle, *and the offence having already been completed when John Whitehurst returned with the hare, there was a sufficient participation by the former to constitute him an aider and abetter within the statute. The facts, it seems to me, abundantly show that the respondent did participate in the trespass: and I agree that the information would have been more artificially framed if it had been laid under the 1 & 2 W. 4, c. 32, s. 30, without referring to the 11 & 12 Vict. c. 43, s. 5, at all. There was abundant evidence to warrant the magistrates in drawing the inference that both were engaged in a common act of trespass in pursuit of game. It may be that they will not choose to infer that the respondent was guilty of the offence. All that we decide is, that, upon the evidence they have laid before us, they might properly have done so. [*357

Judgment for the appellant.

(a) Sic.

KILLBY *v.* ROCHUSSEN. *Jan.* 16.

1. A count by endorsee against drawer of a bill of exchange, alleging presentment and dishonour, and *due notice thereof* to the defendant, is sustained by proof of a subsequent promise by the defendant to pay, notwithstanding it is proved (or admitted) that due notice of dishonour was *not* given.

2. And the Court will, if necessary, amend the declaration, by alleging a waiver of notice.

THIS was an action by an endorsee against the drawer of a bill of exchange. The declaration alleged presentment and non-payment of the bill by the acceptor, and due notice thereof to the defendant.

The defendant pleaded, amongst other pleas, that he had not received due notice of the dishonour of the bill; upon which issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after last Term. The facts were these:—*Some three years ago, Wright, the acceptor of the bill, being desirous of borrowing money, the plaintiff agreed to make him an advance upon his acceptance at twelve months' date, drawn by the defendant. The bill was renewed from time to time. The bill in question falling due on the 28th of March, 1864, a conversation took place between Wright, who was unable to pay it, and the son of the plaintiff, the result of which was that it was to be renewed by a fresh bill, as on the former occasions. No formal notice of the dishonour of the bill was sent to the defendant, but the plaintiff's son swore, that, shortly after the bill became due and had been dishonoured, he saw the defendant, and told him that Wright was unable to pay the bill, to which the defendant replied,—"I think he is: I suppose I must."

*358]

It was objected, on the part of the defendant, that, it being conceded that notice of dishonour had *not* been given, the above conversation (which was denied altogether by the defendant) did not sustain the allegation of notice in the declaration.

His lordship reserved the point; but he also reserved leave to the plaintiff to amend the declaration by substituting for the averment of due notice of dishonour an averment of waiver of notice: and he left it to the jury to say whether or not the defendant had had notice of dishonour, telling them that a promise to pay amounted to notice.

The jury having returned a verdict for the plaintiff,

The Hon. G. Denman, Q. C., on a former day, moved to enter a verdict for the defendant, or for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence.

[WILLES, J.—The result of the authorities upon the subject seems to be, that a promise to pay the bill is an absolute *waiver of notice of dishonour, and gives the go-by to the question whether notice has or has not been given. Bramwell, B., in a considered judgment in Rabey *v.* Gilbert, 6 Hurlst. & N. 536,† says: "If a person who has not had due notice of dishonour, nevertheless think fit to acknowledge his liability, though he does so to a party other than the person who afterwards sues upon the bill, that will enable the latter to maintain his action. For that position it is only necessary to refer to the case of Potter *v.* Rayworth, 13 East 417, where the ordinary notice of dishonour had not been given, but the defendant nevertheless promised to pay a person to whom the plaintiff had endorsed the note. Afterwards the plaintiff brought his action, and relied on that promise, and Lord Ellenborough in his judgment said, 'that, whether the promise to pay was made to the plaintiff or to any other party who held the note at the time, it was equally evidence that the defendant was conscious of his liability to pay the note, which must be because he had due notice of dishonour.' That means due notice so far as he was concerned. And Bayley, J., 'considered

*359]

the promise by the defendant either as an acknowledgment that he had had due notice of the dishonour, or that without such notice he was the proper person to pay the note, as the party for whose use it was drawn.'"] In no case has a promise to pay been considered evidence of notice, where it was proved or admitted that no notice was in fact given. In Hicks *v.* The Duke of Beaufort, 5 Scott 598, 4 N. C. 229 (E. C. L. R. vol. 33), in an action against the drawer of a bill of exchange, the defendant pleaded that he had had no notice of the dishonour of the bill. At the trial it was proved on the part of the plaintiff, that the defendant, upon being called upon for payment of the bill after it had been dishonoured, observed "that it was hard upon him to *be compelled to pay it, as he had only put his name to it as drawer for the accommodation of the acceptor;" [*360 and added, "that, if the acceptor did not pay it, he (the defendant) must:" but he requested the witness to exhaust all his influence to obtain the money from the acceptor before he resorted to him. And it was held that this was evidence, but not conclusive evidence, either that the defendant had had notice of dishonour, or that he waived it. "The cases," said Tindal, C. J., "seem to go to this extent,—where the drawer of a bill, after it has been dishonoured, makes a distinct promise to pay, such promise is evidence that he has received notice of dishonour: and the reason is this, that men are not prone to make admissions adverse to their own interest; and therefore, when the drawer promises payment, it is to be presumed that he does so because he is conscious that he is liable." But, where there is direct proof that no notice has been given, there is no room for presumption. It was put to the jury as a proposition of law that a subsequent promise was equivalent to actual notice. It was never submitted to them whether or not there had been a waiver or dispensation of notice. In Burgh *v.* Legge, 5 M. & W. 418,† upon the traverse of an allegation of notice of dishonour, the plaintiff, in order to support that issue, proved that on the day when the bill became due the defendant called upon him and told him that he knew it would not be paid; that it was no use sending him a two-penny post letter the next day to give him notice, as it was not worth the money; and that he would send the plaintiff money in part payment of the bill on a future day: and it was held that this was not evidence of notice of dishonour, but of a dispensation with it, and that it ought to have been so alleged in the declaration. [WILLIAMS, J.—That is a very different case.] The authorities are *thus summed up in Byles on Bills, 8th edit. 395,—"It was formerly considered doubtful whether [*361 such facts as dispense with presentment, protest, or notice of dishonour, could or could not be given in evidence in support of the common allegations of presentment, protest, or notice, in the declaration. It is now, however, clear that facts dispensing with presentment or notice, such as absence of effects in the drawee's hands, or a countermand of payment by the drawer, must be specially alleged in the declaration; and that proof of those facts is inadequate to the support of a positive averment of presentment, protest, or notice. A promise to pay, however, is still admissible under the common averments as primâ facie evidence that the preliminaries essential to the maintenance of the action, such as, presentment and notice, have

been satisfied. But, if it should distinctly appear in evidence that there has been a neglect to present, and that the defendant, being aware of the omission, afterwards promised to pay, so that the promise is used as a waiver, it is conceived that the declaration must still be special. It may be otherwise, where there has been a neglect to give due notice of dishonour, and a promise to pay, with notice of the omission, has been afterwards made before action brought; for then the defendant has, in the words of the declaration, had notice of the dishonour, which notice, under the circumstances, may be deemed as against him due notice. *But the law on this subject does not appear to be very clearly settled.*" In an earlier chapter, the learned author says—p. 281: "A prior dispensation with notice, as, absence of effects, must be specially alleged in the declaration. So must the impossibility of giving notice, or any other excuse for not giving it. And it is conceived that a subsequent promise, when used as a waiver of
*362] notice, must also be specially pleaded. *But a subsequent promise to pay, when used as evidence of the fact of notice, need not." In Cordery *v.* Colvin, 14 C. B. N. S. 374, Byles, J., says: "The subsequent promise was either evidence of the fact of notice having been received, or that it had been waived." The jury should have had their attention called to the point, in order that it might be seen what it was that they did find. *Cur. adv. vult.*

WILLIAMS, J.—I am of opinion that there should be no rule in this case. The first question raised, is, whether upon the evidence and the finding of the jury there is sufficient to support the declaration as originally framed. I am of opinion that there was, because in effect the evidence was, that the defendant being informed of the dishonour of the bill, unqualifiedly promised to pay it. It must be assumed that no due notice of dishonour was given. It was contended by Mr. *Denman*, that, as it appeared that the defendant had *not* had notice, the promise to pay was not enough to support the allegation in the declaration that due notice of dishonour had been given to him. I am, however, of opinion that there was sufficient evidence, because the defendant was informed that the bill had been dishonoured, and afterwards promised to pay the amount. That operates as an acceptance by him of the notice given as a due notice. The jury, therefore, were not only justified in finding, but were bound to find, that the defendant had received due notice of dishonour. Even if that were not so, we are still of opinion that there was sufficient to sustain the verdict, because the plaintiff had leave to amend his declaration by substituting an averment of waiver of notice for the averment of actual notice. It has, however, been con-
*363] tended by Mr. *Denman* that there was only *evidence for the jury, and their opinion not having been taken upon it, there ought to be a new trial. But I am of opinion, that, if the jury had declined to find that the promise to pay amounted to evidence of waiver, their verdict would have been unsatisfactory, and could not have been allowed to stand. When, therefore, leave was given to amend the declaration by inserting an averment of waiver instead of the averment of notice, it would be idle to send the cause to trial again, for the purpose of putting a question to the jury which they could only find one way. This course is inconsistent with the recent

case of Cordery *v.* Colvin, 14 C. B. N. S. 374 (E. C. L. R. vol. 108). Upon both grounds, therefore, I am of opinion that there is no foundation for a rule.

WILLES, J.—I am entirely of the same opinion. The judgment just pronounced by my Brother Williams is in strict accordance with the law as laid down in Potter *v.* Rayworth, 13 East 417, and Rabey *v.* Gilbert, 6 Hurlst. & N. 536.† The point of pleading is disposed of by the case of Firth *v.* Thrush, 8 B. & C. 387 (E. C. L. R. vol. 15), 2 M. & R. 359 (E. C. L. R. vol. 17). There, the endorsee of a bill of exchange, dishonoured by the acceptor, being ignorant of the place of residence of one of the endorsers, employed an attorney to give notice to him and the other prior endorsers: the attorney, after inquiry, having received information of this endorser's place of residence on the following day, consulted his client, and on the third day sent notice of dishonour to him: and it was held that the notice was sufficient. The declaration averred that the defendant had notice of the dishonour: and the Court held that that allegation was satisfied by proof that he had notice as soon as it could reasonably be given, and that it was unnecessary therefore to state in the declaration the special circumstances which rendered valid the notice given at a *later period than in ordinary cases would be sufficient. Whether or not I approve of the rule there laid down as to the validity of the notice, it is unnecessary to say. [*364

The rest of the Court concurring, Rule refused.

GEORGE EATWELL, Appellant; ANDREW RICHMOND, Respondent. *Jan.* 25.

By a local turnpike Act (10 G. 4, c. cx.), the following tolls were imposed, amongst others,—"1. For every horse drawing any coach, caravan, or other such light carriage (*except stage-coaches*), 4*d.* 2. For every horse drawing any *stage-coach licensed to carry* not more than 16 *passengers*, 5*d.*; and licensed to carry more than 16 passengers, 6½*d.* 3. For every horse drawing any van or other such carriage for the conveyance of goods for hire or pay, 6½*d.* 4. For every horse drawing any caravan or other such carriage (*licensed to carry passengers for hire*), at the same rate as stage-coaches carrying the same number of passengers." And a subsequent clause (s. 7) provided that only one full toll should be taken for passing and repassing on the same day.

A., a carrier, was the owner of a four-wheeled van, in which he journeyed on certain days, and at stated times, between Bath and Chippenham, "carrying goods occasionally, and passengers occasionally, and sometimes both," for payment. He paid the annual duty of 2*l.* 6*s.* 8*d.* imposed by the 16 & 17 Vict. c. 90, sched. D., "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue:"—

Held, that A. was not chargeable with return toll, as the proprietor of a "stage carriage," under the 9th section of the local Act, which provided that "for or in respect of the horses drawing any stage-coach, stage-wagon, van, caravan, cart, or other stage-carriage for the conveyance of *passengers* for payment, hire, or reward, for which toll should have been paid, and which should return on the same day through the same turnpike-gate or bar, the tolls thereby made payable should be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat."

AT a petty sessions holden at Weston, in the county of Somerset, on the 18th of June, 1864, before, &c., six of Her Majesty's justices

of the peace in and for the said county, an information preferred by George Eatwell, the owner and driver of a spring-van on four wheels *365] which travels into Bath from Chippenham and back *three times a week (hereinafter called the appellant), against Andrew Richmond, the collector or keeper of the London turnpike-gate (hereinafter called the respondent), charging for that "he the said Andrew Richmond, on the 6th of June, 1864, at the parish of Swainswick, in the said county of Somerset, did demand and take greater toll for a horse and caravan passing through the said turnpike-gate than he was authorized to do," was heard and determined; and, upon such hearing, the information was dismissed by a majority of the justices then present.

The appellant, being dissatisfied with the determination, as being erroneous in point of law, demanded a case for the opinion of this Court, pursuant to the 20 & 21 Vict. c. 43, which was stated as follows:—

Mr. *Edward Francis Slack*, solicitor, attended on the part of the complainant, and Mr. *Joseph Kilvert Bartrum*, solicitor, attended on the part of the defendant.

Mr. *Slack*, in opening the complainant's case, cited the following authorities in support of his argument, that whenever any doubt existed in a local Act of Parliament in reference to the imposition of tolls, the public, and not the trustees, whose Act it is, and who ought to have been particular as to its wording, were entitled to the benefit of such doubt, viz.: Gildart *v.* Gladstone, 11 East 675, The Stockton and Darlington Railway Company *v.* Barrett, 3 Scott N. R. 803, 2 M. & G. 134 (E. C. L. R. vol. 40), in error, 8 Scott N. R. 641, 3 M. & G. 956 (E. C. L. R. vol. 42), Higginbottom *v.* Perkins, 8 Taunt. 795 (E. C. L. R. vol. 4), and The Stourbridge Canal Company *v.* Wheeley, 2 B. & Ad. 792 (E. C. L. R. vol. 29).

Mr. *Slack* then stated that the appellant, who was a common carrier travelling with his van at a pace not exceeding four miles an hour from Chippenham to Bath, and back, for the conveyance of both goods and passengers, and who was not licensed, but paid a duty of *366] 2*l.* 6*s.* 8*d.* under a clause in the schedule D. annexed *to the Act of Parliament 16 & 17 Vict. c. 90, and which is as follows, —"For every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, or merchandise, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue, where such last-mentioned carriage shall have four wheels, 2*l.* 6*s.* 8*d.*, and where the same shall have less than four wheels, 1*l.* 6*s.* 8*d.*," complained, that, on the 6th of June instant, he was charged by the respondent with a toll of 6½*d.* for his one-horse van on passing through the respondent's gate in the morning, and another toll of 6½*d.* when returning with the same horse and van in the afternoon.

The following are the toll-imposing clauses in the Local Turnpike Act of 10 G. 4, c. cx., under which the respondent acted, which Mr. *Slack* considered applicable to the present case:—

Section 6. "And be it further enacted, that a sum or sums not exceeding the respective tolls following shall be demanded and taken at each and every turnpike, toll-gate, bar, or chain, now set up and continued, or which shall hereafter be set up, upon or across or by the side of the roads by this Act authorized or declared to be made, amended, widened, diverted, improved, and kept in repair, and the several branches thereof, or the said new line of road, by each and every such person or persons as the said trustees shall from time to time by virtue of this Act continue or appoint to receive the same, before any horse, beast, or cattle, or any carriage, shall be permitted to pass through the same, that is to say," amongst others,—

"For every horse or other beast drawing any coach, *barouche, sociable, berlin, chariot, landau, chaise, phaeton, curricle, gig, caravan, cart upon springs, hearse, litter, or other such light carriage (except stage-coaches), any sum not exceeding *four pence:* [*367

"For every horse or beast drawing any stage-coach licensed to carry in the whole inside and outside not more than sixteen passengers, any sum not exceeding *five pence;* and licensed to carry more than sixteen passengers, any sum not exceeding *six pence half-penny:*

"For every horse or other beast drawing any van or other such carriage for the conveyance of goods for hire or pay, any sum not exceeding *six pence half-penny:*

"For every horse or other beast drawing any caravan, tilted wagon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers."

After the toll-imposing clauses are some provisoes, and amongst them are the following:—

Section 7. "Provided always, and be it further enacted, that it shall not be lawful for the said trustees, or their collector or collectors, lessee or lessees, to demand or take more than the respective numbers of tolls in the whole hereinafter mentioned for and in respect of the same horses, cattle, and carriages, for passing and repassing in any one day, to be computed from twelve of the clock in one night to twelve of the clock in the next succeeding night, along the whole line or lines of the said several roads as hereinafter mentioned (except as hereinafter mentioned), that is to say, on the said road which is called the London Road (forming part of the aforesaid first district), not more than one full toll," &c. &c.

Section 9. "Provided always, and be it further *enacted that, for or in respect of the horses or other cattle or beasts drawing any stage-coach, stage-wagon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat." [*368

Mr. *Slack* contended, first, that, as a second toll could only be charged under the proviso in which the word "stage" apparently governed all the other expressions, and as it was not clear that this was a stage-van or a stage-caravan, a second toll could not, upon the

principle he had contended for, be levied upon it,—secondly, that, as the van was not licensed, it did not come within the 4th clause of s. 6, which rendered licensed vehicles liable to the same rate as stage-coaches,—and, thirdly, that, although the respondent might have elected to have charged the appellant 4*d.* under the first clause, or 6½*d.*, as conveying goods for hire, under the 3d clause, yet, having elected to treat it as a goods-conveying van, and charged the higher toll, he had no power to demand such toll again, under the proviso, which extends only to conveyances carrying *passengers*, and not goods.

The following witness was called and examined by Mr. *Slack*:—George Eatwell. "I am a common carrier, living at Chippenham, and travelling to Bath with a light caravan on four wheels, drawn by one horse. I do not travel over four miles an hour. I carry goods occasionally, and passengers occasionally,—sometimes one, and sometimes the other, and sometimes both: always for payment. I deposit passengers occasionally at their own doors, when they request it; and universally I deliver goods at their destination, as *directed.
*369] I pay the 2*l.* 6*s.* 8*d.* duty as a carrier's van: and I produce my notice. That 2*l.* 6*s.* 8*d.* is under the Assessed Duty Act, 16 & 17 Vict. c. 90, schedule D. On the 6th of June, at the London gate, I was charged 6½*d.* each way, which I paid; and I at the same time protested against the payment, and claimed exemption."

Cross-examined by Mr. *Bartrum*. "The caravan has movable seats, which can be put up or down. On the 6th of June, I had one passenger coming into Bath, and no goods, except a bundle belonging to the passenger. On returning, I had the same passenger, and a packet of bacon going to Chippenham. I generally go to Bath on Mondays, Wednesdays, and Saturdays, and return the same day, leaving Chippenham at eight in the morning, and Bath at five in the afternoon. My name is in the carrier's list in the Bath directory."

Mr. *Bartrum*, citing the case of The Queen *v.* Ruscoe, 8 Ad. & E. 386, 3 N. & P. 428, contended, that, as this was a regular conveyance for goods and passengers between certain places, at certain times, on fixed days, it was distinctly a stage-vehicle, coming within the meaning of the proviso which imposed a toll each way; and that, as the appellant carried goods for hire in his van, it was the respondent's duty to charge him the higher toll of 6½*d.*, which toll he had also a right to redemand on the appellant's return.

The justices, by a majority, concurred in the view contended for by Mr. *Bartrum*.

The question for the opinion of the Court was, what toll was chargeable under the local Act on such conveyance as that described in the evidence of George Eatwell, and whether such toll was chargeable again upon the return on the same day of the same horse and vehicle through the same gate.

Should the Court be of opinion that a toll of 6½*d.* *could be
*370] demanded both on going and returning, the determination of the justices was to be affirmed; or, if not, to be reversed, and in the latter case such order made in relation to the matter as to the Court might seem fit.

The tolls which were so demanded and paid as aforesaid were each of them demanded and paid as one full toll at the gate on the road

referred to in the said local Act as the London Road, and not as any part of the additional three-fourths of a full toll which by the said Act the trustees were entitled to charge at certain parts of the road therein referred to as the new line of road.

Kingdon, for the appellant.(*a*)—The question is, under which of the first four clauses of the 6th section *of the local Act of 10 G. 4, c. cx., the appellant was chargeable. Clause 1 is, "For [*371 every horse or other beast drawing any coach, barouche, sociable, berlin, chariot, landau, chaise, phaeton, curricle, gig, *caravan*, cart upon springs, hearse, litter, or *other such light carriage* (except stage-coaches), any sum not exceeding 4*d*." Clause 2 is, "For every horse or beast drawing any *stage-coach licensed to carry* in the whole, inside or outside, not more than sixteen *passengers*, any sum not exceeding 5*d*., and licensed to carry more than sixteen passengers, any sum not exceeding 6½*d*." Clause 3 is, "For every horse or other beast drawing any *van* or other such carriage *for the conveyance of goods for hire or pay*, any sum not exceeding 6½*d*." And clause 4 is, "For every horse or other beast drawing any caravan, tilted wagon, tilted cart, or other such carriage (*licensed to carry passengers for hire*), at the same rate as stage-coaches carrying the same number of passengers." It is submitted that the appellant's vehicle is chargeable under either the first or the third clause, and not under the second or fourth,—he not being licensed to carry passengers for hire, but only under the clause in the 16 & 17 Vict. c. 90, sched. D., which imposes an annual duty of 2*l*. 6*s*. 8*d*. "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, or merchandise, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue." He is, therefore, *within the 7th [*372 section of the local Act, which limits the charge to one full toll for going and returning on the same day, and is not chargeable with return toll under s. 9, which provides, that, "for or in respect of the horses or other cattle or beasts drawing any stage-coach, stage-wagon, van, caravan, cart, or *other stage-carriage for the conveyance of passengers*

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That the appellant's caravan is not a stage-carriage within the meaning of the 6th and 9th sections of the local Act, 10 G. 4, c cx., and was therefore not liable to a second toll on its return journey:

"2. That the 6th section of the local Act only makes stage-carriages liable to toll when they are licensed to carry passengers, and that the appellant's caravan is not so licensed, but only pays a duty as a carriage used by a common carrier under the 16 & 17 Vict. c. 90, Schedule D., and is therefore not liable to pay toll on its return journey, under the 9th section of the local Act:

"3. That the toll imposed by the 6th section of the local Act on stage-carriages varies in proportion to the number of passengers the carriages are licensed to carry, and that the appellant's caravan, not being licensed, cannot be liable to any such toll:

"4. That the appellant's caravan is only liable to a single toll on each journey, either of 4*d*. under the 1st clause of the 6th section of the local Act, or of 6½*d*. under the 3d clause of the same section:

"5. That the respondent, by claiming a toll of 6½*d*. on the first journey, which could only be claimed under the 3d clause of the 6th section of the local Act, has estopped himself from claiming a toll on the appellant's caravan on the return journey, as a stage-carriage, under the 2d clause of the same section, and under the 9th section of the same Act."

for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat." This last provision is confined to "stage-carriages" only, the definition of which is to be found in the second and fourth clauses of s. 6, which vary the toll according to the number of passengers which the vehicle is licensed to carry. At all events, there was no pretence for the charge of 6½*d.*, as if the appellant's van was licensed to carry more than sixteen passengers.

Karslake, Q. C., for the respondent.(*a*)—Upon the evidence given by the appellant himself before the *justices, it is plain that he *373] was regularly plying for passengers between Bath and Chippenham. He is the proprietor of a stage-van or carriage for the conveyance of passengers for hire, and not a mere carrier, though licensed under the 16 & 17 Vict. c. 90, sched. D. [KEATING, J.—Is every toll-gate keeper to canvass the propriety of the duty charged for licenses?] The appellant is clearly within the 4th clause of the 6th section of the Local Act, and liable to the return-toll imposed by s. 9, as the proprietor of a stage-carriage for the conveyance of passengers for payment. The meaning of "stage-carriage" is well defined in The Queen *v.* Ruscoe, 8 Ad. & E. 386 (E. C. L. R. vol. 35), 3 N. & P. 428. There, a Turnpike Act contained a clause giving certain exemptions from toll, but excepted from it by a proviso all horses drawing *any stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage conveying passengers or goods for pay*. R. was a wharfinger and agent to a Company who were carriers of goods by canal. R. kept wagons and horses, which he employed in carrying out goods brought by the Company to his wharf situate at Stoke-upon-Trent, for persons in the neighbourhood, and bringing goods from the neighbourhood to his wharf, for transit by the canal. For such his conveyance of goods he made charges on each parcel. His wagons were so employed in carrying goods to *and from persons residing at or near a *374] place called Lane End, or places intermediate between that and Stoke-upon-Trent, almost every day except Sundays. The wagons went out and returned at different hours, according to cir-

(*a*) The points marked for argument on the part of the respondent were as follows:—

"1. That the van in question was a van or carriage for the conveyance of goods for hire or pay, within the meaning of the local Act, and was therefore liable to pay as and by way of toll a sum not exceeding 6½*d.*:

"2. That the van in question was a 'stage-van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, and reward,' within the meaning of the local Act, and therefore liable to pay a second or return toll:

"3. That it does not appear to have been proved before the justices, or that the fact was, that the appellant took or received any ticket denoting payment of any toll, which enabled the said horse and van to repass through the gate during the day without paying a second or return toll, or toll-free:

"4. That it does not appear to have been proved before the justices, or that the fact was, that the appellant produced any such ticket as aforesaid, so as to entitle the said horse and van to repass through the gate during the day without paying a return toll, or toll-free:

"5. That the fact of its not having been licensed did not prevent its being a van or carriage for the conveyance of goods for hire or pay, or stage-van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, and reward."

cumstances: on some days they made more journeys than on others, and they seldom omitted going altogether. R. had no office or receiving-house at Lane End. And it was held that R.'s wagons were not *stage*-wagons or carriages within the terms of the proviso, and therefore were not excluded from the exempting clause. Lord Denman, C. J., there says: "I should apprehend that the Legislature did not intend to exempt carriages of this description; but, if that was so, the proviso should not have been qualified by the word 'stage,' used as it is here; and we must find some meaning for that expression. Now, the lowest description of a 'stage' would be, a vehicle that starts from some one point at certain stated intervals, as an errand cart may do; anything below this cannot, in my opinion, answer to the term. But the carriages described in this case do not go at stated intervals, and may never go at all." There is nothing in the clause of the Local Act imposing the return toll, about the vehicle being licensed. If *used* for the conveyance of passengers for payment, the return toll is chargeable. It may be that the toll-collector was wrong in demanding 6½*d.*, and that the appellant was only liable to the 5*d.* toll under the second clause in s. 6 of the Local Act; but that does not prevent his being liable to the return toll under s. 9, as upon a vehicle used for the conveyance of passengers. [WILLIAMS, J.—Having elected on the first occasion to take the toll under the third clause of s. 6, he had no right afterwards to shift his ground.]

ERLE, C. J.—The first question for our decision in *this case, is, whether the respondent had a right under the circumstances stated to demand the return toll. It appears that the appellant is in the habit of travelling at stated times from Bath to Chippenham and from Chippenham to Bath with a four-wheeled van for which he pays an annual duty of 2*l.* 6*s.* 8*d.*, which is the duty payable under the 16 & 17 Vict. c. 90, Sched. D., "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, and merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in carrying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the Commissioners of Inland Revenue." The appellant's caravan, therefore, is not a carriage licensed for the conveyance of passengers at all, but goods; though it appear that he occasionally does, and did upon the occasion in question, carry a passenger for hire. The question is, whether that occasional use of his vehicle makes it a stage-carriage, upon which a return-toll is imposed by the 9th section of the Local Act. The 6th section imposes tolls in respect of a variety of carriages. By clause 2, "for every horse or beast drawing *any stage-coach licensed to carry* in the whole, inside and outside, not more than *sixteen passengers*, any sum not exceeding 5*d.*; and licensed to carry more than sixteen passengers, any sum not exceeding 6½*d.*" Then comes clause 2,—"for every horse or other beast drawing any van or other such carriage *for the conveyance of goods for hire or pay*, any sum not exceeding 6½*d.*" The appellant's vehicle clearly is not a "stage-coach" licensed to carry passengers. But, if he is liable in respect of his carrying passengers, it could only be under clause 4, which is as follows,—"for every horse or other beast drawing [*375

*376] *any caravan, tilted wagon, tilted cart, or other such carriage (licensed to carry passengers for hire), at the same rate as stage-coaches carrying the same number of passengers." Is this appellant the proprietor of a carriage "licensed to carry passengers for hire?" He pays duty as a carrier of goods for hire; and he occasionally carries passengers: for the out toll he clearly does not fall within the description given either in the second or the fourth clause. The 7th section limits the tolls to be taken on this particular road to one full toll each day. The 9th section provides that toll shall be paid for every time of passing and repassing, if the vehicle comes within the class described in that section. The carriages there described are, "any stage-coach, stage-wagon, van, caravan, cart, or other stage-carriage for the conveyance of passengers for payment, hire, or reward." I think that section is to be read with the 6th; and by the 6th section the rate of toll is settled and ascertained by the license which the owner of the vehicle has, and consequently that the return toll is imposed only upon stage-coaches or carriages which are licensed to carry passengers for hire. The construction sought to be put by the respondent upon this 9th section is, that, because the word "licensed" is there omitted, the toll-gate keeper has a right to look into every carriage, and to inquire quo intuitu the particular journey is made, and to claim the return toll when it is used for the carriage of a passenger. I am very clear that he has no such right, and that the toll imposed by s. 9 is imposed in respect of that which is the accustomed use of the vehicle, and that the toll-gate keeper should be satisfied with the license which the party has. It would lead to the most pernicious consequences if he were to be allowed to stop and cross-examine the driver every time of passing, as to the *377] *object of his journey, and so change the liability at his discretion or caprice. Vexatious delay and possible breaches of the peace would naturally be the result. The Legislature never could have intended to allow that. The character of the vehicle is to be determined by the license which the owner has obtained for it; and the toll-gate keeper must be content with that.

Williams, J.—I am of the same opinion. The vehicle in question is clearly not a "stage-carriage" within s. 9 of the Local Act, merely it is used occasionally for the conveyance of passengers.

Willes, J.—I am of the same opinion. The case will go back to the justices with an intimation of our opinion that the appellant was not under the circumstances liable for the back toll, but that 6½*d.* was the proper sum to be demanded for the forward toll.

Keating, J.—I entirely agree with the rest of the Court. The toll-gate keeper was right when he demanded a toll of 6½*d.* under the third clause of s. 6 of the Local Act; and I think that precluded him from afterwards claiming the return toll under s. 9.

Case remitted, without costs.(a)

(a) See the next case.

*JAMES COMLEY, Appellant; WILLIAM CARPENTER, Respondent. *May* 16. [*378

By a local turnpike Act (6 G. 4, c. cxliii.), the following tolls (amongst others) were imposed,—"For every horse or other beast drawing any coach, *stage-coach*, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, curricle, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, 9*d.*: For every horse or other beast drawing any wagon, wain, cart, or other such like carriage, having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, 6*d.*" And a subsequent clause provided that one toll only should be paid for passing and repassing on the same day.

A., a carrier, was the owner of a covered caravan (the single toll on which was admitted to be 6*d.*) with which he travelled between Cirencester and Cheltenham every Tuesday and Thursday, at a pace not exceeding four miles an hour. He used his caravan principally for carrying *goods, for hire*, but he frequently (as he did upon the occasion in question) conveyed therein also *passengers*, for hire. He was not licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120, but paid the duty imposed by the 16 & 17 Vict. c. 90, sched. D., "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, and merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue:"—

Held, that A. was the proprietor of a "stage-carriage *conveying goods* for pay or reward," within the 11th section of the local Act, which provided that "the tolls thereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage conveying passengers or *goods* for pay or reward, shall be payable and paid every time of passing or repassing along the said road;" and therefore liable to the return toll.

AT a petty sessions held on the 27th of February, 1865, at Cirencester, in the county of Gloucester, an information was preferred by James Comley (hereinafter called the appellant) against William Carpenter (hereinafter called the respondent) for that the respondent, on the 16th of February, 1865, at Stratton, in the said county, then being the collector of the tolls at a certain turnpike-gate there, called the Stratton Gate, on a certain turnpike-road there situate, unlawfully did demand and take from the appellant the sum of 6*d.* as and for the toll of a horse and cart of which the appellant was the driver, on the said turnpike-road, the said appellant being exempt from the payment of such toll by reason of toll having been paid for the passing of the same horse and cart through the same gate on the same day, and the said horse and cart being then returning and repassing through the same gate before twelve o'clock at night of the same day: and, after hearing the parties and the evidence adduced by them, the information was dismissed.

*Against this decision the appellant appealed; and the following case was stated for the opinion of the Court, pursuant to the statute 20 & 21 Vict. c. 43:— [*379

It was proved, on the part of the appellant, that he is a common carrier, living at Cirencester, and travelling between that town and the town of Cheltenham every Tuesday and Thursday; that he so travels, sometimes with a covered caravan or wagon on four wheels, and sometimes with a covered caravan or cart on two wheels, drawn respectively by one or two horses, as the weight of the load or the state of the roads may require, and travelling at a pace not exceeding four miles an hour; that the said appellant uses such caravans principally for carrying goods, for hire, but that he frequently conveys

therein also passengers, for hire; that he is not licensed under the Stage-Carriage Act for either of such caravans, but pays the duties of 2*l.* 6*s.* 8*d.* and 1*l.* 6*s.* 8*d.* for the same respectively, as for carriages used by a common carrier, under the 16 & 17 Vict. c. 90, schedule D.; that, on the day on which the alleged offence is charged to have been committed, being Thursday, the 16th of February, 1865, the appellant travelled as usual from Cirencester to Cheltenham. and back, with the said covered caravan or cart on two wheels, and which on that occasion was drawn by one horse; that, on the morning of the day in question, the appellant conveyed goods in such caravan from Cirencester to Cheltenham, and in the afternoon conveyed goods therein from Cheltenham to Cirencester, and in each case delivered such goods according to the directions thereon, and received payments for the carriage and delivery thereof according to a usual scale adopted by him; that he also on the day in question conveyed one passenger on each time of passing the same gate, and received payment of such passenger; that the appellant travels from Cirencester
*380] *to Cheltenham along the turnpike-road between those towns, and which is one of the district roads which are repaired and maintained under the provisions of the Cirencester Roads Act, 1862, 6 G. 4, c. cxliii.; that there is a turnpike or toll-gate upon such road, in the parish of Stratton, called the "Stratton Gate," and that the respondent is the collector of tolls at such gate; that, on the morning of the day in question, the appellant passed through the said gate on his way to Cheltenham, and was charged by the respondent a toll of 6*d.* for the horse drawing the said caravan, and paid the same; and that, on the afternoon of the said day (and before twelve o'clock at night), the appellant repassed through the said gate on his return to Cirencester, and was then again charged by the respondent a toll of 6*d.* for the same horse drawing the same caravan, which second toll the appellant thereupon paid under protest.

The Cirencester Roads Act, 1862, was put in evidence.

The preamble of such Act recites an Act passed in the 6 G. 4, c. cxliii., intituled "An Act for maintaining and improving certain roads leading to and from the town of Cirencester in the county of Gloucester," which last-mentioned Act was also put in evidence, and contains the following sections:—

Section 8. "And be it further enacted that it shall and may be lawful for the said trustees or any person or persons to be appointed collector or collectors of the tolls to be taken by virtue of this Act, to demand and take the tolls hereinafter mentioned, at the several and respective toll-gates or turnpikes or toll-houses, or side-gates or side-bars or chains, which shall be erected or placed by virtue of this Act in, upon, across, or on the sides of the said roads, and on every day
*381] (such day to be computed from twelve of the clock at *night to twelve of the clock in the next succeeding night), that is to say,

"For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, curricle, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, the sum of 9*d.*:

"For every horse or other beast drawing any wagon, wain, cart, or

other such like carriage, having the felloes of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 9*d.*; and having the felloes of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches at the bottom or soles thereof, the sum of 7½*d.*; and having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6*d.*:

"For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 1*d.*:

"For every ox or head of neat cattle, the sum of 1*d.*: and for every calf, sheep, swine, or lamb, the sum of ½*d.*

"Which said respective sums of money or tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass through any toll-gate or turnpike, or side-gate, or side-bar or chain, which shall be erected or placed by virtue of this Act in, upon, or across the said roads, or on the sides thereof, or any part thereof; and which said respective tolls shall be and are hereby vested in the said trustees, and shall be applied for the purposes of this Act in manner hereinafter directed:"

Section 9. "Provided always, and be it further enacted, that, in case the toll hereby authorized to be taken shall have been paid for the passing of any *horse, beast, or cattle, through any one of such toll-gates, turnpikes, or side-gates, such horse, beast, or [*382 cattle shall, upon a ticket denoting such payment on that day being produced, be permitted to pass toll-free through the same toll-gate, turnpike, or side-gate, and also through any such other gate or gates (if any) as the ticket for such payment shall free, at any time or times during the same day (to be computed as aforesaid), anything in this Act contained to the contrary thereof in anywise notwithstanding."

Section 11. "Provided always, and be it further enacted, that the tolls hereby made payable for or in respect of horses or beasts drawing any *stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage, conveying passengers or goods for pay or reward*, shall be payable and paid every time of passing or repassing along the said road."

The Act of 1862 enacts as follows:—

Section 1. "From and after the commencement of this Act, the said recited Act of the 6 G. 4, c. cxliii., shall be repealed, and this Act shall thenceforth be put into execution during the term and for the purposes hereinafter mentioned."

Section 13. "Notwithstanding the repeal of the recited Act, the several tolls thereby granted and made payable shall continue to be paid at the toll-gates to be continued or erected on or on the sides of the said roads, until other tolls shall be appointed to be taken under the powers of this Act."

Section 16. "From and after the commencement of this Act, it shall be lawful for the said trustees to demand and take on each and every day, such day to be computed from twelve of the clock at night to twelve of the clock on the next succeeding night, at each and every toll-gate which shall be continued or set up by virtue of this Act in, upon, across, or on the sides of *the said roads, or any of them, such tolls as the said trustees at any of their meetings [*383 shall direct, not exceeding the sums following, that is to say:—

"For every horse or other beast drawing any coach, stage-coach, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, curricle, chair, gig, whiskey, hearse, litter, chaise, break, or other such like carriage, the sum of 9*d.*:

"For every horse or other beast drawing any wagon, wain, cart, van, caravan, dray, timber-carriage, steam-engine or machinery, or other carriage of a like description, by whatsoever name called or known, having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, the sum of 6*d.*: and having the felloes of the wheels thereof of the breadth of four and a half inches or upwards, and less than six inches, at the bottom or soles thereof, the sum of 7½*d.*; and having the felloes of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof, the sum of 9*d.*:

For every, horse, mule, or ass, laden or unladen, and not drawing, the sum of 2*d.*:

"For every drove of oxen or neat cattle the sum of 1*s.* 8*d.* per score, and so in proportion for any less number:

"And for every drove of calves, swine, sheep, lambs, or goats, the sum of 10*d.* per score, and so in proportion for any less number:

"Which said tolls shall be demanded and taken before any horse, mule, ass, beast, or other cattle whatsoever shall be permitted to pass through any toll-gate which shall be maintained, erected, or placed by virtue of this Act, in, upon, or across any of the said roads, or on the sides thereof, or any part thereof; and which said respective tolls
384*] shall be and are hereby vested *in the said trustees, and shall be applied for the purposes of this Act in manner hereinafter directed."

Section 18. "In case the tolls hereby authorized to be taken shall have been paid for the passing of any horse, mule, ass, beast, or other cattle or animal, or any carriage, through any or either of such toll-gates, no toll shall be demanded or taken for or in respect of such horse, mule, ass, beast, or other cattle or animal, or carriage, returning, passing, or repassing through the same toll-gate before twelve of the clock at night of the same day; but on a note or ticket being produced, denoting the payment of such toll, such horse, mule, ass, beast, or other cattle or animal, or carriage, shall (except in the cases hereinafter mentioned) be permitted to pass toll-free through the same toll-gate, and also through every such other toll-gate or gates, if any, as the ticket for such payment shall free, at any time during the same day before the said hour: which note or ticket, naming and specifying the gate or respective gates freed by such payment, the several collectors of the said tolls are hereby respectively required to give gratis on receipt of the toll."

Section 20. "The tolls hereby made payable for or in respect of horses or beasts drawing any *stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-wagon, or other stage-carriage conveying passengers or goods for hire or reward,* shall be payable and paid every time of passing or repassing along the said roads, or any of them."

On the hearing of the said information, it was treated as an admitted fact on both sides, that, under the said Acts, the sum of 6*d.* demanded and paid in respect of the appellant's caravan on the first time of the

same passing the said gate, as before stated, was the toll legally and properly payable in respect thereof: but it was not proved or admitted before the justices *whether such toll was payable under the Act of 6 G. 4, as continued by s. 13 of the Act of 1862, or whether the same was payable by virtue of section 16 of the said Act of 1862. [*385

The appellant contended,—first, that his caravan was not a carriage conveying passengers or goods for hire or reward, within the meaning of s. 20 of the said Act of 1862, and that therefore the horse drawing the same was not liable to pay toll on each time of passing through the said gate,—secondly, that, according to the construction of such section, the stage-carriage thereby made liable to pay toll every time of passing along the turnpike-road, means a stage-carriage *licensed as such* under the Stage-Carriage Act, 2 & 3 W. 4, c. 120.

The respondent contended,—first, that the caravan driven by the appellant was a stage-carriage conveying *goods* for hire or reward, within the meaning of the said section, and that therefore the horse drawing the same was liable to pay toll on each time of passing through the said gate,—secondly, that, according to the true construction of such section, a carriage which is used as a regular conveyance for *goods and passengers* between certain places, at stated times, on fixed days, and in respect of which duty is paid under the 16 & 17 Vict. c. 90, schedule D., as a carriage used by a common carrier, is a stage-carriage, and liable to toll on each time of passing notwithstanding that, by reason of such carriage travelling at a pace not exceeding four miles an hour, the same may not be licensed or require to be licensed under the Stage-Carriage Act,—thirdly, that, by giving the said section the construction contended for by the appellant, no meaning is attached to the words "or goods," contained therein, inasmuch as a stage-carriage, as defined by the Stage-Carriage Act, means a carriage used or employed for the purpose of carrying passengers for hire.

*The justices were thereupon of opinion that the appellant's caravan was a stage-carriage conveying *goods* for hire, within the meaning of the said Acts, and that the same was liable to toll on each time of passing and repassing along the said turnpike-road, and they therefore dismissed the information. [*386

The question for the opinion of the Court was,—whether, upon the above facts, the appellant was legally chargeable with the toll of 6*d.* in respect of the said caravan, on the occasion of his repassing along the said turnpike-road on the day mentioned in the said information.

Should the Court be of opinion that the appellant was so chargeable, then the decision of the justices was to be affirmed. If otherwise, then such decision was to be reversed, and such order made in relation to the matter of the said information as to the Court should seem fit.

Kingdon, for the appellant.—The present case very much resembles that of Eatwell, app., Richmond, resp., antè, p. 364; but the words of the section of the Act then under consideration (10 G. 4, c. cx.), which imposed the return toll (s. 9), are somewhat different from those of the corresponding clause in the statute now before the Court. In both cases, however, the duty paid by the owner of the vehicle was that charged upon carriages used by a common carrier under the 16

& 17 Vict. c. 90, Schedule D.; and in neither case was the vehicle licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120. In Eatwell, app., Richmond resp., the Court in substance held that the vehicle of the appellant, not being *licensed to carry passengers for hire*, was not liable for the second toll, under the proviso in s. 9 of the 10 G. 4, c. cx., that "for or in respect of the horses or other cattle or
*387] beasts drawing any stage-coach, *stage-wagon, van, caravan, cart, or other stage-carriage *for the conveyance of passengers* for payment, hire, or reward, for which toll shall have been paid, and which shall return on the same day through the same turnpike-gate or bar, the tolls hereby made payable shall be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat." Under the Act now in question,—which for the purpose of the argument may be assumed to be the 6 G. 4, c. cxliii.,—the proviso is (s. 20)·"the tolls hereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-wagon, *or other stage-carriage conveying passengers or goods for hire or reward*, shall be payable and paid every time of passing or repassing along the said roads, or any of them." The definition of a "stage-carriage" given in the 2 & 3 W. 4, c. 120, s. 5, is as follows:—"Every carriage used or employed for the purpose of conveying passengers for hire to or from any place in Great Britain, and which, when passing along any highway or other road, shall travel at the rate of three miles or more in the hour,(*a*) shall, without regard to the form or construction thereof, be deemed and taken to be a stage-carriage within the meaning of this Act; provided the passengers, or any one or more of them, thereby conveyed, shall be charged or shall pay separate and distinct fares or a separate and distinct fare, or shall be charged or pay at the rate of separate and distinct fares, for their respective places or seats or his place or seat therein or conveyance thereby." And the 6th section enacts that "it shall not be lawful for any person to keep, use, or employ any stage-carriage, unless such
*388] person shall have a license in force so to do, granted *to him under the authority of this Act," &c. Some light may be thrown upon the question by the 19th section of the 25 Vict. c. xiii., which enacts that "the tolls hereby made payable for and in respect of horses or beasts drawing any wagon, cart, or other such carriage shall be payable and paid for or in respect of horses or beasts drawing any wagon, cart, or other such carriage laden with stone, every time of passing and repassing along the said roads, or any of them." [MONTAGUE SMITH, J.—What effect can you give to the words "stage-coach, caravan, or other stage-carriage conveying passengers *or goods* for hire or reward," in s. 20?] The words "or goods" are not found in the corresponding clause in the 10 G. 4, c. cx.: but the difficulty suggested by Erle, C. J., as to the inexpediency of an examination by the toll-gate keeper into the use of the carriage on the particular journey, is quite as apparent in the one case as in the other. Primâ facie, the appellant is liable only for one toll under the 9th section of the 6 G. 4, c. cxliii. (or the 18th section of the 25 Vict. c. xiii.): and it is for the respondent to satisfy the Court that the return toll ought

(*a*) Altered by a later Act to four miles.

to be imposed. To render him so chargeable, it is submitted, the appellant must be shown to be the owner of a licensed stage-carriage, as well as of a carriage conveying passengers or goods for hire and reward. [BYLES, J.—This vehicle was conveying, and was constructed for the conveyance of, goods.] No doubt it was.

No one appeared on behalf of the respondent.

WILLES, J.—In this case the Court has sustained much inconvenience from the fact of no counsel having been instructed to appear on the part of the respondent. Probably in consequence of having heard only the argument for the appellant, my mind has *fluctuated considerably. At last, however, upon the best consideration I am able to bring to bear upon the case, I have arrived at the conclusion that the decision appealed from is right. I do not mean to throw any doubt upon the recent decision of this Court in Eatwell, app., Richmond, resp. On the contrary, it has my entire assent. But, comparing the language of the Act of Parliament upon which that decision proceeded with that of the Act we have now to interpret, it seems to me that the expression in the 11th section of the 6 G. 4, c. cxliii.,—"any stage-coach, &c., or other stage-carriage *conveying passengers or goods* for pay or reward,"—bears a substantially different meaning from the words of the 9th section of the 10 G. 4, c. cx., upon which Eatwell, app., Richmond, resp., proceeded, viz. "any stage-coach, &c., or other stage-carriage *for the conveyance of passengers* for payment, hire, or reward." The result of the consideration I have been able to give to the case is similar to the result in the case referred to; because, as there the Court held, upon the true construction of the statute then before them, that the carriage to be exempted from the return toll was a carriage to be licensed as such under the Acts relating to the inland revenue, and not a carriage to be used as a carrier's wain, without reference to the particular employment at the time of its passing the toll-gate, so in this case my impression is that all carriages falling within the description of stage-carriages must pay the toll for each time of passing, without reference to whether or not they are actually conveying passengers or goods at the time of passing through the gate, provided they are intended for the purpose of carrying passengers or goods at the time the toll is demanded. The expression in the Act, "conveying passengers or goods," may mean either to denote the employment of the vehicle at the moment of passing through the gate, or *it may denote the employment for which the carriage is destined, though not at the moment earning a fare from the conveyance of passengers or goods. I incline to think that the latter is the true construction, and that the exemption ought to be read as if it ran, "stage-carriage for the conveyance of goods for hire," which is the conclusion at which the magistrates arrived. I feel the full force of the suggestion thrown out in Eatwell, app., Richmond, resp., as to the inconvenience which would result from a search on every occasion to see whether or not the carriage contained passengers or goods. For these reasons, I think the return toll is charged in respect of any horse, &c,, drawing any carriage which falls within the definition of a stage-carriage, and that it is not necessary to go into the inquiry as to whether or not it is actually doing the work of a stage-carriage at the time of passing

[*389

[*390

through the gate. I think more effect will be given to the language of the Act by adopting the conclusion the magistrates came to, than by yielding to the argument urged by Mr. *Kingdon*.

BYLES, J.—I am of the same opinion. It seems to me that this vehicle might well fall within either of the single-toll clauses of the 6 G. 4, c. cxliii. The first clause comprehends vehicles of a kind used by the superior classes of society: the second deals with vehicles of an inferior description. If this vehicle falls within the first clause, it is undercharged. If such a vehicle goes through a toll-gate once, it pays: if it returns, it is not charged again, unless it falls within the description of carriages in s. 11, that is, "any stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage, conveying passengers or goods for pay or reward." It seems to me that, *391] in whichever single toll clause this vehicle falls, it falls within *the return-toll clause. A stage-carriage means a carriage plying regularly from place to place. The case finds that this caravan was used for the regular conveyance for hire of goods, and occasionally of passengers, from Cirencester to Cheltenham and back. That being so, it is a "stage-carriage, caravan, or wagon," within s. 11. If it is adapted for the conveyance of passengers or goods, or so used, or both adapted and used for that purpose, the requisites of the statute are fulfilled. Upon the words of *this Act*, I am of opinion that the return toll was plainly payable. I desire to throw no doubt upon the decision of this Court in Eatwell, app., Richmond, resp., and I certainly feel none. As far as I can see my way, I am of opinion that the two decisions will in no degree conflict.

KEATING, J.—I am of the same opinion, though at one time I inclined to yield to the argument of Mr. *Kingdon*. I am now, however, satisfied that the magistrates have come to a right conclusion: nor do I think that this decision will at all conflict with Eatwell, app., Richmond, resp., to which I was a party. The language of the statute which we had to consider in that case was quite different from that of the Act of Parliament now before us. The difficulty I conceive here is, to strike out the words "or goods" in the return-toll clause. That being so, we cannot take the license from the Commissioners of inland revenue as a test of the double liability. The return-toll clause in Eatwell, app., Richmond, resp., imposed the second toll in respect of the horses drawing any stage-coach, &c., "for the conveyance of *passengers* for payment, hire, or reward." The test, therefore, which was applicable in that case is not applicable here. It is impossible to give any effect to the words of the return-toll clause in this Act of Parliament, without holding that the appellant was properly charged.

*392] *MONTAGUE SMITH, J.—I also think the conclusion which the magistrates came to in this case was right. The primary object of the appellant's journeys, was, the carriage of goods for hire, though he occasionally carried passengers also. The case, therefore, falls distinctly within the 20th section of the 25 Vict. c. xiii. (which is in terms the same as the 11th section of the 6 G. 4, c. cxliii.), and which imposes the return toll "for or in respect of horses or beasts drawing any stage-coach, diligence, omnibus, van, caravan, chaise, cart, chair, break, or stage-wagon, or other stage-carriage, conveying

passengers or goods for hire or reward." It is said that that cannot be so, because the appellant's vehicle is not a vehicle requiring a license under the 2 & 3 W. 4, c. 120. Nor does any carriage used for the conveyance of goods for hire require such a license. The construction the Court is putting upon s. 20 is very much fortified by the language of the 21st and 22d sections, which are to be taken in pari materiâ with the 20th. The 21st section enacts that "the tolls thereby made payable for or in respect of horses or beasts let out to hire, and drawing any post-chaise or other carriage, shall be payable and paid every time of passing along the said roads, or any of them, whenever any new hiring thereof shall take place, in the same manner as if no previous payment of tolls in respect of such horses or beasts had been made on the same day." And the 22d section enacts that "the tolls hereby authorized shall be payable at each and every toll-gate belonging to the trustees, in respect of horses or other beasts of draught drawing any wagon, wain, dray, cart, or such like carriage, for every time during the same day that any such horse or other beast of draught shall pass through any of the toll-gates of the trustees, drawing any other wagon, wain, dray, cart, or such like carriage, than that which such horse or other *beast [*393 of draught was employed in drawing at any former time during the same day at which such tolls shall have been paid." This vehicle was in effect hired by different persons on the two journeys. Upon this Act, therefore, I feel no doubt that the justices have come to a right conclusion. I also think the case of Eatwell, app., Richmond, resp., is distinguishable, on the grounds stated by my two learned Brothers who were members of the Court when that decision was pronounced. Decision affirmed.

PENNY, Executor of PENNY, deceased, *v.* BRICE. *Jan.* 18.

1. It is not competent to an executor to maintain an action for a debt which accrued to his testator, and for which he might have sued, more than six years before the issuing of the writ.
2. A. had a right of action against B. for a debt in respect of which the Statute of Limitations began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved the will on the 12th of July, and commenced an action against B. on the 5th of November:—Held,—that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the proceeding *within a reasonable time.*

THIS was an action brought by the plaintiff, as the executor of the last will and testament of Charles Penny, deceased, to recover the balance of an account for money lent and money paid by the testator in his lifetime to the use of the defendant.

The cause having proceeded as far as declaration was by an order of a Judge, under the Common Law Procedure Act, 1854, referred to a barrister, with power to state a case for the opinion of the Court.

It was contended by the defendant's counsel before the arbitrator, that the whole demand was barred by the Statute of Limitations; and the arbitrator found that it was, except as to the sum of 187*l.* 13*s.* 5*d.* As to that sum, he stated the following case:

*394] *The cause of action for the sum in question arose in England, while the defendant was beyond the seas, in India, whence he returned to England some time in September, 1856, and remained. The other material facts arose in the year 1862, as follows:—

The plaintiff's testator died on the 31st of May, never having brought any action. The plaintiff, his surviving executor, proved the will on the 12th of July. On the 1st of October six years had elapsed since the defendant's return to England. On the 5th of November, this action was brought.

The plaintiff's counsel contended that the action had been brought within a reasonable time after the death of the testator, and therefore was not barred. The defendant's counsel contended that the action was barred on the expiration of the six years; and he denied that the action had been brought within a reasonable time.

In so far as that question might be treated as one of fact to be found by the arbitrator for the Court, he found that the action was brought within a reasonable time after the death of the testator.

The question for the opinion of the Court was,—whether, as to the sum in question, the action was barred by the Statute of Limitations.

If it was not, judgment was to be entered for the plaintiff for that sum. If it was, judgment was to be entered for the defendant, barring the action.

Mellish, Q. C., for the plaintiff.—The question for the consideration of the Court in this case, is, whether, if one having a cause of action dies shortly before the time when his demand would be barred by the Statute of Limitations, his executor may bring an action after the expiration of the six years from the accrual of the cause of action, provided he commences it within a reasonable time after the death of

*395] his testator. *The affirmative of that proposition receives some countenance from a passage in Williams on Executors, 5th edit. p. 1706, where it is said, that, "If an executor takes out proper process in assumpsit within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet *it is said* that will be sufficient to take the case out of the statute (Tidd 28, 9th edit., citing Cawer *v.* James, Bull. N. P. 150). But, where a plaintiff dies, a writ by journeys accounts cannot be brought by his executor: Kensey *v.* Heyward, 1 Ld. Raym. 432. It was indeed ruled in Elstob *v.* Thorowgood, 1 Ld. Raym. 283, that a general executor might bring a writ by journeys accounts upon a writ brought by the executor durante minore ætate, although it was otherwise in the case of a writ brought by an administrator durante minore ætate. But, in Kinsey *v.* Heyward, Treby, C. J., said, that, although he concurred in that opinion on the former occasion, he was never ashamed to retract his opinion, when convinced upon better reason: and he therefore now declared that he thought that the executor could in neither case have the writ; because in no case can a writ of journeys accounts be, but by the same person, not only in representation, but strictly and truly the same person: see Spencer's Case, 6 Co. Rep. 10 b. However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may,

within the equity of the 4th section of the Statute of Limitations (21 Jac. 1, c. 16), bring a new action,—Matthews *v.* Phillips, 2 Salk. 425; Kinsey *v.* Hayward, 1 Lutw. 260,—provided he does it recently, or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time: but it should seem that the statute *is the best guide upon the subject; and, as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period: 2 Saund. 64 *a*, note to Hodsden *v.* Harridge. In Rinsey *v.* Heyward, a year is said to be a reasonable time: and the Court of King's Bench appears to be of this opinion in Wilcox *v.* Huggins, 2 Stra. 907, Fitz. 178, 289." [WILLES, J.—This matter was much discussed in the Court of Queen's Bench in Curlewis *v.* The Earl of Mornington, 7 Ellis & B. 283, and afterwards in the same case in the Exchequer Chamber, 27 Law J., Q. B. 439; and also in the Exchequer in Rhodes *v.* Smethurst, 4 M. & W. 42† (in error, 6 M. & W. 351†), where it was held, that it is no answer to a plea of the Statute of Limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor within the six years died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted.] In the case last cited, it was the defendant who died. In the absence, however, of any express authority, it is difficult to ask the Court to disregard the plain words of the statute. [*396

Coleridge, Q. C., contrà, was not called upon.

ERLE, C. J.—I am of opinion that there must be judgment for the defendant. There is, as Mr. *Mellish* admits, no express authority. And the words of the statute are too plain.

WILLIAMS, J.—The passage referred to in Williams on Executors was guardedly cited, out of deference to *the authority of Tidd. The facts found here clearly afford no answer to a plea of the statute. As to the action being brought within a reasonable time, that is not applicable to a case where no action had been brought by the testator. The present case falls within the general rule, that, where there is a cause of action, and a person who can be sued, the Statute of Limitations begins to run, and, having begun, it continues to run. [*397

WILLES, J.—The decision of Curlewis *v.* The Earl of Mornington, in the Exchequer Chamber, is put upon the ground that an action had been brought, and abated by the death of the defendant; and a fresh action commenced by the plaintiff after the six years, but within four months from the date of the administration, was held to have been brought within due time, either according to the equitable construction of the 4th section of the Statute of Limitations, or according to the principle of the old writ by journeys accounts. Here, no action had been brought within six years, and therefore Rhodes *v.* Smethurst is in point. No action has been lost, and therefore we cannot apply the old doctrine of journeys accounts, or the modern law under the 4th section of the statute of James.

KEATING, J., concurred. Judgment for the defendant.

*398] *PERCIVAL *v.* OLDACRE. *Jan.* 17.

The defendant, who had a horse for sale at a commission stable, meeting the plaintiff at Tattersall's, and being informed by him that he had been looking at the horse, said,—"He is a good harness horse. He belonged to Baron R., who sold him because he could not match him." The plaintiff went again to the stable, and, after having had the horse put into a break, agreed to purchase him for 65*l*. There was no suggestion that the defendant had intentionally misrepresented the horse: but he turned out to be a kicker. The jury having found that the representation made at Tattersall's was part of the contract, and amounted to a warranty that the horse was quiet in harness,—the Court refused to disturb the verdict.

THIS was an action for an alleged breach of warranty on the sale of a horse.

The cause was tried before Byles, J., at the sittings at Westminster after the last Term. The evidence was in substance as follows:—In January, 1863, the plaintiff went to Banks's commission stables, in the Gray's Inn Road, and there saw some horses which belonged to the defendant, and among them a gray horse. He shortly afterwards met the defendant at Tattersall's, and said to him, "I have been to Banks's, and have seen a gray horse there," upon which the defendant replied, "He is a good harness-horse. He belonged to Baron Rothschild, who sold him because he could not match him." The plaintiff again went to Banks's, and had the horse put into a break and tried, and ultimately he bought him for 65*l*.,—which was 15*l*. less than the defendant had given for him. It was true that the horse had belonged to Baron Rothschild; and no fraud was imputed to the defendant; but the animal turned out to be a kicker.

The conversation at Tattersall's was relied on by the plaintiff as a warranty that the horse was quiet in harness.

On the part of the defendant, it was submitted that there was no evidence of either misrepresentation or warranty; and Hopkins *v.* Tanqueray, 15 C. B. 130, was relied on. There, A. sent his horse to Tattersall's for sale by public auction, where he was to be sold without a warranty. On the day prior to the intended sale, meeting B. at the stable, and seeing him in the act of examining the horse's legs, A. said,—"You have nothing to look for; I assure you he is perfectly *399] *sound in every respect;" whereupon B. replied, "If you say so, I am perfectly satisfied," and, upon the faith of the representation so made to him by A.,—which was admitted to have been made in perfect good faith,—became the purchaser: and it was held that there was no evidence of *warranty* to go to a jury,—the representation made by A. on the day preceding the auction forming no part of the contract of sale.

The learned Judge left the case to the jury, but reserved leave to the defendant to move (if the jury should be against him) to enter the verdict for him if the Court should be of opinion that there was no evidence of warranty.

The jury having returned a verdict for the plaintiff, with 25*l*. damages,

Hawkins, Q. C., moved to enter a verdict for the defendant, pursuant to the leave reserved. He submitted that the conversation which passed between the plaintiff and the defendant at Tattersall's before there was any negotiation for a sale of the horse, did not amount to

anything like a warranty, nor even to a representation,—for which he relied upon Hopkins *v.* Tanqueray.

ERLE, C. J., after consulting BYLES, J., now said that the Court, having read the learned Judge's notes, were of opinion that there was evidence to go to the jury, and that they were justified in finding, as they did, that the representation made by the defendant at Tattersal's was part of the contract; and consequently that there should be no rule. Rule refused.

---

*PHILLIPS and Another *v.* J. C. IM THURN. *June* 19. [*400

To an action upon a bill of exchange purporting to be drawn by A. payable to the order of B., and to have been endorsed by B. to C., and by C. to the plaintiff,—the defendant (who had accepted the bill for the honour of A.), besides traversing the endorsements by B. and C., pleaded that, when the bill was made, there was no such person as B., the supposed payee, but that his name was merely fictitious, whereof he (the defendant) at the time of his acceptance of the bill had no notice or knowledge.

The Court declined to allow the plaintiff to reply that the names of B. and C. were already on the bill when the defendant accepted it, and consequently that he was estopped from denying that they were real endorsers,—holding that the matter was admissible under the traverse of the endorsement.

THIS was an action against the acceptor for honour of a bill of exchange.

The first count of the declaration stated that theretofore, to wit, on the 12th of May, 1864, certain persons by and under the name and style of Canevaro & Co., in parts beyond the seas, to wit, at Lima, made their bill of exchange in writing, and directed the same to one H. H. Stultzberger, and thereby required the said H. H. Stultzberger, at sixty days' sight, to pay by that their first of exchange (second and third not being paid), to the order of Mr. Carlos Raffo the sum of 400*l.* sterling, and the said Carlos Raffo then endorsed the said bill to one Enrique Plana, who then endorsed the same to the plaintiffs; and the said bill was duly presented to the said H. H. Stultzberger for acceptance, and he then saw but did not nor would then or at any other time before or afterwards accept the same or the said second or third of exchange in the said bill mentioned; whereupon the said bill was then duly protested for non-acceptance thereof,—of all which the defendant then had due notice; and thereupon the defendant, in order to prevent the said bill from being sent back and returned to the said Canevaro & Co., did, under the said protest, according to the custom of merchants, accept the said bill for the honour of the said Canevaro & Co.; and the said H. H. Stultzberger did not pay and has never paid the said bill, or the said second or third of exchange in the said bill mentioned, or any part thereof, although more than sixty days had before suit elapsed from the time when the said bill was so seen and *accepted by the defendant as aforesaid, and although the said bill was duly presented to the said H. H. Stultzberger [*401 and the defendant for payment on the day when it became due; whereupon the said bill was duly protested for non-payment thereof, —of all which premises the defendant then had due notice; and, although all conditions had been fulfilled, and all times had elapsed, necessary to entitle the plaintiffs to maintain this action against the

defendant in respect of the breach thereinafter alleged, and nothing happened to prevent the plaintiffs from maintaining the action for the same, yet the defendant had not paid the said bill, or any part thereof, and had always wholly neglected and refused so to do; and by reason of the premises the plaintiffs incurred and were put to divers costs and expenses in and about the presenting and noting of the said bill, and otherwise incidental to the dishonour thereof.

There was also a count for money had and received, money paid, and money found due upon accounts stated.

The defendant pleaded, to the first count,—1. That the defendant did not accept the said bill as alleged,—2. That the said Carlos Raffo did not endorse the said bill to the said Enrique Plana, as alleged,—3. That the said Enrique Plana did not endorse the said bill to the plaintiffs, as alleged,—4. That the said bill was not duly presented to H. H. Stultzberger for payment, as alleged,—5. That the said bill was not duly presented to the defendant for payment, as alleged,—6. That when the bill of exchange in the said first count mentioned was made, there was no such person as Carlos Raffo, the supposed payee named in the said bill, but the name of Carlos Raffo was and is merely fictitious, whereof the defendant at the time of his acceptance of the said
*402] bill had no notice or knowledge,—7. That the said bill was not duly protested for non-payment thereof, as alleged,—8. (to the second count), never indebted.

Hannen moved for leave to reply by way of estoppel, that the names of Raffo and Plana were already on the bill at the time the defendant accepted for honour. The application had been made to Crompton, J., at Chambers, but was negatived, on the ground that the matter might be given in evidence under the traverse of the endorsement. He referred to Ashpitel *v.* Bryan, 32 Law J., Q. B. 91, where Wightman, J. and Crompton, J., seem to have held that such matter need not be replied, but might be given in evidence under the traverse of the endorsement. That case, however, can hardly be called a decision upon the point, inasmuch as all the pleadings but the traverse of the endorsement, &c., were struck out by consent, the defendant having leave to appeal, and the Court of error to have power to make all amendments to determine the question as to the quasi estoppel in pais. [WILLES, J.—Sanderson *v.* Collman, 4 M. & G. 209 (E. C. L. R. vol. 43), 4 Scott N. R. 638, is an authority to show that matter of estoppel in pais *may* be pleaded. But it is very clear that matter of estoppel in pais *need not* be pleaded.]

ERLE, C. J.—I am of opinion that the matter sought to be replied may be given in evidence under the traverse of the endorsement: and I am strongly of opinion that that is the more expedient course.

The rest of the Court concurring,

Hannen took nothing.

*FALK *v.* FLETCHER and Another. *Jan.* 16. [*403

The plaintiff, a salt-merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice and a draft at four months to De M.

In November, 1863, De M. chartered the ship S. F., belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta,—freight to be paid one-third by freighter's acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the S. F., and had shipped 1007 tons (for which he took the mate's receipts *in his own name*), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate's receipts for the 1007 tons, and demanded a bill of lading for that quantity, *making it deliverable to his order.* This the defendants refused, and the vessel sailed with the salt on board:—

Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the S. F. with the intention of passing the property therein to De M.; and that (the jury having found that the plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing.

THIS was an action brought by the plaintiff, a salt-merchant at Liverpool, against the defendants, shipowners in London, for the alleged wrongful conversion of 1007 tons of salt, with the usual common counts.

The defendants pleaded, to the first count, not guilty, and that the goods were not the goods of the plaintiff, and, to the rest of the declaration, never indebted.

The cause was tried before Blackburn, J., at the last Assizes at Liverpool, when the following facts appeared in evidence:—In November, 1863, one W. N. De Mattos, a merchant in London, entered into the following charter-party for a voyage to Calcutta:—

"London, November 12th, 1863.

"It is this day mutually agreed between G. H. Fletcher & Co., owners of the good ship or vessel called the Savoir Faire, A. 1 at Lloyd's, new iron ship, of 1400 tons or thereabouts, now in the port of Liverpool, whereof —— Meikle is master, and W. N. De Mattos, of London, merchant, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible despatch load, in the usual and customary manner, a full and complete cargo of salt, which the said freighter binds himself to *ship, not exceeding what she can reasonably stow and carry over [*404 and above her tackle, apparel, provisions, and furniture; the freighter finding mats, and the ship dunnage, both as customary; and, being so loaded, shall therewith proceed to Calcutta, or so near thereto as she may safely get, and deliver the same alongside any craft, floating depôt, or pier where she can lie afloat, as ordered by the consignee: Notice to be given to the agents of the vessel being ready to discharge (the act of God, the Queen's enemies, pirates, fire, and all and every other dangers and accidents of the seas, rivers, and navigation during the said voyage being mutually excepted): The freight to be paid on unloading and right delivery of the cargo, at and after the rate of 21*s.* per ton on the quantity delivered, in full of all port-charges, pilotages, and Dover and Ramsgate dues as customary: and such

freight is to be paid, say, one-third by freighter's acceptance at four months from the final sailing of the vessel from her last port in the United Kingdom, less cost of insurance, and the remainder on the right delivery of the cargo agreeably to bills of lading, in cash, at current rate of exchange for bills on London at six months: The vessel to deliver as customary, and the cargo to be discharged at the average rate of not less than sixty tons a working day, weather permitting, or to pay demurrage at the rate of 4*d.* per ton register (O. M.) per diem: All claims for average to be settled in London in conformity with the rule at Lloyd's: The ship and her freight are bound for this venture: The penalty for non-performance of this agreement is to be 1800*l.*

"In the event of the ship putting into Table or Timon's Bay, the captain is to address himself to Messrs. Dean, Brothers & Co., subject to reply by Friday the 31st instant, at noon, by telegraph.

"G. H. FLETCHER & Co.
"W. N. DE MATTOS.

*405] *"The captain to apply to Mr. H. E. Falk for cargo and custom-house business."

The plaintiff was in the habit of shipping cargoes of salt for De Mattos. The course of business between them was this:—When De Mattos took up a ship on charter-party, a copy of the charter-party was sent to the plaintiff, and he thereupon shipped the salt "free on board," charging a commission which he included in the invoice-price,—De Mattos having no agent at Liverpool. The salt was thereupon shipped by the plaintiff from his own lighters, and weighed on board, the mate's receipt being given for the quantity received, which was afterwards exchanged for a bill of lading, making the salt deliverable to the plaintiff or his assigns. The plaintiff then sent the bill of lading to De Mattos in London, together with an invoice and a draft at four months for the price.

On the present occasion, after the plaintiff had in the usual way shipped about 1007 tons of salt on board the Savoir Faire, he received intelligence that De Mattos had stopped payment. He communicated the fact to the defendants, who thereupon wrote to De Mattos, as follows:—

"Liverpool, December 9th, 1863.

"Sir,—We write to inform you that Mr. Falk has stopped the loading of the Savoir Faire, on the ground, as he alleges, that you have stopped payment. We much regret that this should be so: but, having made all arrangements for the vessel's proceeding to sea at the end of this week, we must send her; and we are compelled to hold you liable for all loss and injury which we must sustain by reason of the vessel's loading not being completed.

"G. H. FLETCHER & Co."

No reply to this letter was sent. The plaintiff then proposed to *406] the defendants to allow him to complete *the loading of the ship on his own account; or that they should purchase the 1007 tons already on board, and complete the loading on their account; or to give him a bill of lading for the quantity he had shipped, he paying freight according to the charter-party. Feeling themselves fettered by the charter-party with De Mattos, the defend-

ants declined to assent to either of these proposals: and, no more salt being sent on board by the plaintiff, the defendants completed the loading, and the vessel sailed with the salt on board on the 15th of December.

On the 16th, the plaintiff sent his clerk with the mate's receipts for the 1007 tons, and demanded a bill of lading in his own name. The defendants refused to give it. No offer of a draft for one-third of the freight, pursuant to the charter-party, was made. On the same day, a protest was made against the defendants for their refusal to sign bills of lading.

Upon the arrival of the Savoir Faire at Calcutta, Messrs. Gosche & Co., the plaintiff's agents, wrote to Messrs. Borradaile & Co., the defendant's agents, a letter, as follows:—

"Calcutta, April 9th, 1864.

"To Captain Meikle, master of the ship Savoir Faire, and to Messrs. John Borradaile & Co., agents for the said ship.

"Gentlemen,—As agents for and on behalf of Mr. Hermann Eugene Falk, of Liverpool, the shipper per the said ship of 745 tons of stoved salt, and 262 tons of butter salt, we hereby present to you the mate's receipts (eleven in number) for the said salt, and demand the delivery thereof, we being ready and willing and hereby offering to pay freight for the same at the rate of 21*s.* per ton of 20 cwt. delivered.

"R. G. GOSCHE & Co."

To this letter Messrs. Borradaile & Co. replied, as follows:—

*"Calcutta, April 9th, 1864. [*407

"Messrs. R. G. Gosche & Co.

"Dear Sirs,—We are in receipt of your favour of this date, addressed to Captain Meikle, of the Savoir Faire, and to ourselves as agents for the said ship, tendering us mate's receipts on behalf of Mr. Hermann Eugene Falk, of Liverpool, for 745 tons of stoved salt and 262 tons of butter salt shipped by the Savoir Faire, and offering to pay freight for the same at the rate of 21*s.* sterling per ton of 20 cwt. delivered.

"As we intimated to the bearer of your letter, to whom we returned the mate's receipts tendered by you, we decline to deliver the salt in question to your good selves as agents for Mr. H. E. Falk, of Liverpool, Messrs. G. H. Fletcher & Co., of Liverpool, the owners of the Savoir Faire, informing us that the late firm of Messrs. De Mattos & Co. were the shippers of the same, and that the proceeds will have to be accounted for to the estate of the firm.

"JOHN BORRADAILE & Co."

The salt was afterwards sold by Messrs. Borradaile & Co. at Calcutta, and realized 1154*l.*, which, after deducting 1050*l.* for the freight and expenses, left 104*l.* as the value of the 1007 tons. The value of the salt at Liverpool on the day of sailing, without the freight and expenses, was proved to be 582*l.* 19*s.* 6*d.*

On the part of the defendants it was contended, that, by the delivery of the salt on board the Savoir Faire, the property passed to De Mattos, the delivery on board being as much a delivery to the vendee as if the salt had actually been delivered into the vendee's warehouse: and that the taking of the mate's receipts was nothing more than a means of ascertaining the quantities.

For the plaintiff, it was insisted that he had done nothing to divest himself of the property in the salt, *and that the sailing of the vessel with the salt on board amounted to a conversion. *408]

The learned Judge left it to the jury to say whether or not the plaintiff by putting the salt on board the defendants' vessel had so parted with the possession as to vest the property therein in De Mattos, and whether the defendants had been guilty of a conversion,—telling them, that, if they thought that by delivering the salt on board the plaintiff intended to pass the property in it to De Mattos, and that the taking the mate's receipts in his own name was a mere accident, they might find for the defendants; but that, if they thought that by taking the receipts in his own name the plaintiff intended to retain a control over the property, they must find for the plaintiff; and that the sailing away from Liverpool with the salt without giving the plaintiff a bill of lading, was evidence of a conversion. As to the damages, the learned Judge told the jury that the plaintiff would be entitled to recover the value of the salt on the day of the conversion in Liverpool.

The jury returned a verdict for the plaintiff, damages 582*l.* 19*s.* 6*d.*

E. James, Q. C., now moved for a new trial, on the grounds of supposed misdirection and that the verdict was against the evidence, and also on the ground of surprise as to the amount of damages. He submitted that there was no conversion of the salt by the defendants prior to the sailing of the ship from Liverpool, there having been no demand except the qualified proposals which the defendants declined to accept; and that the delivery of the salt on board a ship chartered by the buyer, irrespective of the form of the mate's receipts, passed the property to the buyer, and that the seller could not afterwards change its destination. *[WILLES, J.—Can he be said to have given it a destination before he got a bill of lading? Having got the mate's receipts in his own name, he was the only person who would be entitled to demand a bill of lading.] The plaintiff was acting as agent for De Mattos. He had notice of the charter-party, which fixed the destination of the ship; and he could not alter it. The fact of his having taken the mate's receipts in his own name was only a circumstance. The learned Judge, therefore, was wrong in telling the jury that what occurred at Liverpool amounted to a conversion. He was also wrong in telling the jury that they might give as damages the value of the goods at the time of the sailing from Liverpool; whereas, the only conversion was the sale at Calcutta. Assuming that the conversion was at Liverpool, the damages were calculated upon a wrong basis.(*a*) *409]

ERLE, C. J.—I am of opinion that there should be no rule in this case. The plaintiff was in reality in the position of an unpaid vendor. As agent for De Mattos, he put the salt on board a ship chartered by De Mattos, taking the mate's receipts for it in his own name. Under these circumstances, the proper question for the jury, and the ques-

(*a*) He produced affidavits showing that the amount claimed and allowed by the jury as the price of the salt at Liverpool was extravagant; that the price which the defendants paid for the quantity required to fill up the ship was 6*s.* per ton for stoved salt, and 5*s.* per ton for butter salt, at which prices the value of 745 tons of the former and 262 tons of the latter, including river freight and dock and town dues, would have been 450*l.* 12*s.* 6*d.*, and the cost of mats for dunnage 15*l.*

tion which was submitted to them, was, whether when he put the salt on board he intended to pass the property in it to De Mattos, or whether he intended to keep it under his own control. *The jury have found that he did not intend absolutely to part [*410 with the control over the property and to pass it to De Mattos. Then, the next question is, was there a conversion? and when? The vessel sailed from Liverpool with the plaintiff's property on board, and it was lost to him. That was a wrongful conversion: and the plaintiff was entitled to recover the value of the salt at that time, which the jury have given him. I cannot think there is any ground for saying that the defendants were taken by surprise with respect to the damages. They might have qualified themselves to prove the real value of the salt at the date of the sailing of the ship from Liverpool.

WILLIAMS, J.—I am of the same opinion. It was a pure matter of fact what was the intention of the plaintiff in putting the salt on board; and the jury might well have found it either way. They having found that the plaintiff did not intend to part with the control over it, I see no ground for our interference. One of the elements to be taken into consideration in disposing of that question, is, the circumstance that the plaintiff filled the joint character of vendor and agent to the vendee. No doubt that was powerfully pressed upon the attention of the jury. I see no misdirection. As to the conversion, as soon as the defendants sailed away from Liverpool with the salt, and thereby deprived the plaintiff of the control over it, they were clearly guilty of a conversion. As to the affidavits, they show no ground for a rule: the defendants must have been aware that the amount of damages would be a question, and they ought to have come properly prepared to meet it.

WILLES, J.—I am of the same opinion. It appears to me that the proper question was left to the jury in *this case, viz., whether [*411 or not it was the intention of the plaintiff to appropriate the 1007 tons of salt to De Mattos, and to pass the property therein to him, when he put it on board the Savoir Faire. And, looking at what appears to have been the course of business between the plaintiff and De Mattos, I think the jury came to a right conclusion. Many hard cases have arisen from the course of business frequently adopted, of remitting the bill of lading, invoice, and draft for acceptance, direct to the principal,—as in Key *v.* Cotesworth, 7 Exch. 595,†—instead of adopting the course there suggested, of transmitting the bill of lading endorsed in blank to an agent, to be delivered over only upon the draft being accepted. The course adopted by this plaintiff on the previous transactions with De Mattos was similar to that adopted in Turner *v.* The Trustees of the Liverpool Docks, 6 Exch. 543.† There, B. & Co, merchants at Liverpool, sent orders to M. & Co., merchants at Charleston, to ship on account of B. & Co., a quantity of cotton for the homeward voyage of their ship, the Charlotte. M. & Co. accordingly made considerable purchases of cotton, and shipped it on board the vessel of B. & Co. The master signed a bill of lading of the cotton, to be delivered at Liverpool "to order or to our assigns, paying for freight for the cotton nothing, being owners' property; and M. & Co. endorsed the bill of lading,—"Deliver the within to the Bank of Liverpool, or order." M. & Co. informed B. & Co. that they

had drawn bills upon them for the cargo on their account by the Charlotte, and desired them to insure the cotton. M. & Co. also sent to B. & Co. an abstract invoice, which stated that the cotton was shipped by M. & Co. on board the Charlotte for Liverpool "by order and for account and risk of B. & Co. there, and addressed to order." M. & Co. afterwards sent a full invoice, stating that the cotton was
*412] *shipped for Liverpool "by order and for account of B. & Co. there, and to them consigned." M. & Co. not having sufficient funds of B. & Co. to pay for the cotton, sold the bills to a bank at Charleston, and delivered to the bank the bill of lading so endorsed, as a security for payment of the bills, which were dishonoured, and taken up by M. & Co. B. & Co. became bankrupt before the arrival of the vessel; and on its arrival M. & Co., by their agent, claimed to stop the cargo in transitu, and it was afterwards stored in the warehouse of the defendants. The assigns of B. & Co. having brought detinue, the defendants traversed the possession of the assignees, and also set up the right of M. & Co. as against them. It was held,—first, that the property in the cotton did not vest absolutely in B. & Co., *notwithstanding the delivery on board their ship:* for, by the terms of the bill of lading, M. & Co. reserved to themselves a jus disponendi of the goods, which the master acknowledged by signing the bill of lading making the cotton deliverable to their order or assigns, although by so doing the master might have exceeded his authority,—secondly, that M. & Co. did not by their endorsement and delivery of the bill of lading to the bank divest themselves of their property in or possession of the goods. Here, the mate's receipts were given in the plaintiff's name. It is clear, therefore, that he meant to adopt the later practice, and to have the bill of lading made deliverable to himself or order, that he might make use of it for his further security. The fact of the plaintiff being agent for De Mattos is no doubt a circumstance that is not to be lost sight of. But, in the sense of being the person who put the goods on board, he is in the same condition as if he had been an ordinary unpaid vendor. For this the case of Feise *v.* Wray, 3 East 93, is an authority, though that was a case of stoppage in transitu.
*413] *There, a trader in London gave an order to his correspondent abroad to ship him certain goods, which the latter procured upon his own credit, without naming the trader here, and shipped to him at the original price, charging only his commission: and it was held that the correspondent abroad was so far a *vendor*, as between him and the trader here, that, on the bankruptcy of the latter, he might stop the goods in transitu by procuring the bill of lading from the bankrupt's brother,—and this though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the value of the goods. The fact of the plaintiff's being agent was one which under the circumstances the jury rightly disregarded. As to the conversion,—I think that was complete when the vessel sailed away with the plaintiff's goods on board. And, as to the damages, the value of the salt at Liverpool at the time of the conversion was indisputably the proper measure of damages; and there is nothing in the affidavits to warrant us in disturbing the verdict on that ground.

KEATING, J., concurred. Rule refused.

*CLUBB *v.* HUTSON. *Jan.* 19. [*414

A promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretences, is illegal, and cannot be enforced.

THIS was an action by the payee against the maker of a promissory note.

The defendant pleaded, amongst other pleas, that, before the making of the note, the plaintiff had preferred a charge against the defendant of obtaining money by false pretences, and that, in consideration of the plaintiff's consenting to withdraw the charge and abstain from prosecuting the same, the defendant agreed to give him 10*l.* and the promissory note declared on (for 20*l.*), and that the charge was thereupon abandoned.

At the trial before Willes, J., at the first sitting at Westminster in this Term, the plea being proved, the learned Judge directed a verdict to be entered for the defendant, reserving to the plaintiff leave to move.

Reynolds, accordingly, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that the consideration for the note, as stated in the fifth plea, was not illegal. He relied on Drage *v.* Ibberson, 2 Esp. N. P. C. 643.

H. Matthews now showed cause.—This case is decided by Keir *v.* Leeman, 6 Q. B. 308. It was there held, that the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which offence the injured party might recover damages in an action; but that, if the offence is of a public nature, no agreement can be valid that is founded upon the consideration of stifling a prosecution for it. Therefore, although the party injured may lawfully compromise an indictment for *a common *assault*, an [*415 agreement to pay the costs of a prosecution for assault on the plaintiff *and riot*, and of an action for unlawful levy under a fi. fa., which agreement was founded partly on compromise of the prosecution and partly on an undertaking to withdraw the execution under the fi. fa., was held to be altogether invalid, as grounded on an illegal consideration,—although the compromise of the prosecution was entered into with the leave of the Judge before whom the indictment came on for trial. The judgment of the Court of Queen's Bench in that case was affirmed on error; upon which occasion all the authorities were carefully reviewed: and Tindal, C. J., in delivering the judgment of the Court, says: "It seems clear, from the various authorities brought before us on the argument, that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded on an illegal consideration. Such was the case of Collins *v.* Blantern, 2 Wils. 341, 347, which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. It is difficult to comprehend the case of Johnson

v. Ogilby, 3 P. Wms. 277, 279. There, a prosecution for a fraud was suppressed, and that suppression made the consideration for an agreement to pay money. The distinction between felony and misdemeanor seems to have been the foundation of the decision, if it was made, by Lord Talbot,—a distinction overruled in Collins *v.* Blantern, which was decided at a later period. It is not, indeed, at all clear that the indictment for the fraud was compromised, as a part of the agreement, or that the fraud was an indictable one: and perhaps the case may be *so explained. If not, it cannot, we conceive, be sustained as law." After observing upon Drage *v.* Ibberson, 2 Esp. N. P. C. 643, his Lordship adds,—"But there is a class of cases, such as Beeley *v.* Wingfield, 11 East 46, and Baker *v.* Townshend, 7 Taunt. 422, J. B. Moore 120, which do not at all break in upon sound principles. These are cases where the private rights of the injured party are made the subject of agreement, and where, by the previous conviction of the defendant, the rights of the public are also preserved inviolate. As Gibbs, C. J., in the latter case, well observes, 'the parties have referred nothing but what they have a right to refer. They have referred the several assaults' (by which we understand him to mean, their several rights to damages for those assaults): 'these may be referred. They have referred the right of possession: that may be referred. The reference of all matters in dispute *refers all other their civil rights*;' which words show our previous interpretation to be correct." And, in conclusion, his Lordship says: "We have no doubt, that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit." That, it is submitted, is a decisive authority in favour of the validity of this plea.

*416]

Reynolds, in support of his rule.—Obtaining money by false pretences is a private misdemeanor. [ERLE, C. J.—It is on the borders of larceny.] Drage *v.* Ibberson was a case of obtaining goods by false pretences: and Lord Kenyon said "he should adhere to the class of cases which held that the consideration being the settling a misdemeanor, might be good in law." The rule is thus laid down in Byles on Bills, 8th edit. *p. 125: "Considerations impeding the course of public justice, as, dropping a criminal prosecution for a felony or a *public* misdemeanor, or suppressing evidence, are illegal considerations,"—citing Nerot *v.* Wallace, 3 T. R. 17, Fallowes *v.* Taylor, 7 T. R. 475, Edgecombe *v.* Rodd, 5 East 294. "But it has been held that compounding a *private* misdemeanor is a good consideration for a note,"—citing Drage *v.* Ibberson, 2 Esp. N. P. C. 643, and Coppock *v.* Bower, 4 M. & W. 361.† No man is bound to prosecute for a misdemeanor. The remedy is substantially for the benefit of the person who is injured by it.

*417]

ERLE, C. J.—It is to the interest of the public that the suppression of a prosecution should not be made matter of private bargain. I think the obtaining money by false pretences is not one of the misdemeanors in which the personal interest of the aggrieved party alone

is concerned. The case of Kier *v.* Leeman, 6 Q. B. 308, 9 Q. B. 371, appears to me to be a decisive authority in favour of this defence.

The rest of the Court concurring,

Rule discharged.(*a*)

(*a*) See Ward *v.* Lloyd, 7 Scott N. R. 499.

The rule of the common law, that the suppression of a prosecution for crime shall not form the consideration of a contract, is well established in England and the United States.

[Cases of promissory notes given to compound felony, and held void: Bell *v.* Wood, 1 Bay. 249; Plumer *v.* Smith, 5 N. Hamp. 553; given to suppress supposed felony, and to purchase the silence of witnesses: see Sharswood, J.'s note to Byles on Bills [105]. Notes given to suppress felony are not void when given from motives of affection, not *gain:* Bell *v.* Wood, *supra;* Ward *v.* Allen, 2 Metc. 53. Such notes are void in the hands of a bonâ fide endorsee: Bell *v.* Wood; *contra,* Clark *v.* Recker, 14 N. Hamp. 44. Defence to such notes, its nature, and how pleaded: Catlin *v.* Henton, 9 Wisc. 476; Steuben County Bank *v.* Mathewson, 5 Hill 249; see, also, Mattocks *v.* Owen, 5 Verm. 42; Smith *v.* Richards, 29 Conn. 232; People *v.* Bishop, 5 Wend. 10; Town of Harrisburg *v.* Sumner, 9 Verm. 23; Story on Bills, § 186; 1 Pars. on Bills 196, 215; Roll *v.* Raquet, Ohio Rep. Cond. 842; Shaw *v.* Reed, 30 Maine 105; Hert *v.* Cooper, 41 N. Hamp. 115; Cameron *v.* McFarland, 2 Car. Law R. 415; Commonwealth *v.* Pease, 16 Mass. 91.

A conveyance of land was held, however, not to be avoided, because made in consideration of the suppression of a felony: Inh. of Worcester *v.* Eaton, 11 Mass. 368.]

Scarcely so fully recognised, approved, or understood, is the single exception of which the rule admits, that allows the compromise of such misdemeanors as affect the individual and not the public: Fay *et al. v.* Oatley *et al.*, 6 Wisc. 55; and makes valid an agreement for such compounding: Byles on Bills [105]; Chitty on Contracts 673.

Tindal, C. J., in the case of Kerr *v.* Leeman, cited in the text, regards this exception as based rather on dicta than decisions, remarking that were the point res integra, no compromise of a crime would be held to be a legal consideration. Judge Story refers in terms of almost equivalent force to the principle: "Where an act occasioning only private injury, though criminal in itself, has been already committed, a contract under seal to make satisfaction therefor to the individual injured, in consideration of a waiver of prosecution, would *seem* to be good." Thus, a bond given to a person injured by an assault and battery to make satisfaction, and to prevent prosecution, has been held to be valid: Price *v.* Summers, 2 South. 578; but Southard, J., in this case expressed a doubt as to its validity. "But this exception seems to be doubtful, and at all events only applies to cases where the misdemeanor is purely personal:" 1 Story on Contr. § 569. In Gardner *v.* Maxey, 9 B. Monr. 90, the Court spoke questioningly of the principle. In Corley *v.* Williams, 1 Bailey 588, it was held that a promissory note was void which had been made in settlement of an assault; and in Vincent *v.* Groom, 1 Yerg. 430, that such a note is void unless made by leave of Court: see also Chitty on Bills [84]. In Jones *v.* Rice, 18 Pick. 440, 2 Benn. & Heard Lead. Cr. Cases 278, the validity of this exception seems flatly denied. Prosecutions for bastardy may be com-

pounded, being of a civil character, although criminal in form: Harter v. Johnson, 16 Ind. 271, Parker v. Way, 15 N. Hamp. 45; Hort v. Cooper, 41 Id. 115; Holcomb v. Stimpson, 8 Verm. 144; Robinson v. Crenshaw, 2 Stewart & Paterson 276. Aliter, when criminal, Smith v. Burney, 32 Verm. 282; Maurer v. Mitchell, 9 W. & S. 71. The compounding of such prosecutions in Pennsylvania was permitted by statute as well as of those for assault and battery; the principle of these acts was further developed in the Penal Code of Pennsylvania, and any "misdemeanor to the injury and damage of the party complaining, and not charged to have been done with intent to commit a felony, and for which there shall also be a remedy by action," may be compromised: Act of 31st March, 1860, § 9, Purd. Dig. 251, pl. 9. See 3 Rev. Stat. of New York 1021, 1022. The compounding of felonies is punished in the same Act, § 10, Purd. Dig. 218, pl. 12.

It appears that "in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his *private* damage in any way he may think fit. It is said indeed, that in the case of an assault, he may also undertake not to prosecute on behalf of the public; *but we are not disposed to extend this any further:*" Kerr v. Leeman, *supra*.

This right of the injured party to settle his private damage, cannot be exercised so as to interfere with his public duty of denouncing crime: "it is sometimes a nice question of fact whether the amends taken were not intended to operate as a compounding of the public offence. So, it is sometimes a nice question of law, whether the Court will enforce an obligation given to pay for the private injury as having been obtained under circumstances calculated to obstruct the course of public justice:" 1 Bishop on Cr. Law, § 505.

From the above citations it would appear, that according to the principle of the common law, no felony nor misdemeanor affecting the public can be compounded, and strictly speaking, every misdemeanor is a public wrong. If it involves a private wrong the latter is distinct, and may be satisfied and settled; but over the public right of prosecution the injured individual can have no control. It is thought the leaning of the Courts in England, and still more in America, is against the existence of any exception (other perhaps than a simple assault) to the rule, that the compounding of crime shall not form the consideration for a contract. A compromise, however, made in compliance with the Penal Code of Pennsylvania, above cited, would, it is believed, be a legal consideration consistent with the ruling in Maurer v. Young, 9 W. & S. 71, under our Act permitting the settlement of cases of bastardy: "thus the offence, like assault and battery, with which it was associated in that statute, becomes little more than a private wrong, and when the Legislature authorized the parties to treat it as such between themselves, the contract certainly became legal as far as they were individually concerned:" Gibson, C. J. What misdemeanors may be thus compromised under the Code other than assaults, it is difficult to determine.

The case of Shaw v. Spooner, 9 N. Hamp. 197, presents a point similar to that in the text. See also Shaw v. Read, 30 Maine 105.

See notes of Hare and Wallace to 1 Smith's Lead. Cas. (last edition) p. 619, Collins v. Blantern; Mr. Rawle's note to Smith's Law of Contracts 208.

SKILTON *v.* SYMONDS. *Jan.* 27.

Where a deed of composition under s. 192 of the Bankruptcy Act, 1861, has been duly registered, but has become unavailing by reason of the failure of the debtor to carry out the arrangement, the application for leave to issue execution against his property or person under s. 198 must be made to the Court of Bankruptcy.

THE defendant had entered into a deed of composition with his creditors under the 192d section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by which they released him from their several debts in consideration of his engagement to pay a composition of 2*s.* 6*d.* in the pound by instalments at three and six months. The deed was registered and a certificate of registration duly obtained under the 198th section of the Act. The defendant having failed to pay the instalments, pursuant to his covenant,

Griffits, on a former day in this term, obtained a rule calling upon him to show why the plaintiff should not have the leave of this court, under the above-mentioned section, "to make the judgment obtained by him in this action available by execution by fi. fa. or ca. sa., notwithstanding the registration of the deed of composition by the defendant, he the defendant not having paid or tendered to the plaintiff and others the first instalment payable under the said deed when due." He referred to the 198th section, which enacts, that, "after notice of the filing and registration of such deed [a deed under s. 192] has been given as aforesaid [under s. 193], no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, *without leave of the court:* and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available to the debtor for all purposes as a *protection in bankruptcy." The question was whether that meant [*419 the leave of the Court out of which the process issued, or the leave of *the Court of Bankruptcy*. Referring to the interpretation clause of the Bankruptcy Act, 1861, s. 229, which declares that "the Court" shall mean the Court in London, or any country District Court, or any County Court acting under this Act, according as such several constructions shall be consistent with the context," it would seem that the leave of the Court of Bankruptcy was intended: but, on the other hand, it might be urged that the Court of Bankruptcy would have no power to interfere with the process of the superior Courts at Westminster. [KEATING, J.—The Lord Chancellor has held that the debtor must apply for his discharge to the Court out of which the process issues. ERLE, C. J.—And that was the inclination of this Court in Leigh *v.* Pendlebury, 15 C. B. N. S. 819, 820, 109.] Acting upon at principle, the Court of Bankruptcy has refused to discharge a party.

Kenealey now showed cause.—This, which is the first application of the kind which has been made in full Court, is in effect an attempt to revoke or annul an order of protection in bankruptcy. The deed, which has been executed and duly registered, is good upon the face of it: and no fraud is suggested,—the only objection which can be urged,

being, that the debtor has failed to pay or tender the composition instalments. [ERLE, C. J.—The release is conditional only upon the instalments being paid or tendered. The contention on the part of the creditor, is, that the deed, though valid at first, has become inoperative by reason of the non-performance of a condition subsequent. If the deed were altogether void, no doubt we might interfere. WILLIAMS, J.—Such an order as is sought by this *motion was made by Pollock, C. B., at Chambers, in a case of Daniels *v.* Gladstone.] *420] It is submitted that this is not the proper Court in which to try whether or not the bankrupt has acted properly. "The Court" in s. 198 must mean the Court of Bankruptcy: no other Court is mentioned or referred to in that section: and wherever the legislature has intended to preserve the jurisdiction of the superior Courts of common law, it has done so in express terms. This is manifest from the 197th section, which enacts, that, "from and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors and trustees parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the *Court of Bankruptcy*, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects, in bankruptcy; and, except where the deed shall expressly provide otherwise, *the Court* shall determine all questions arising under the deed, according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such *421] orders as it would be authorized to do if the *debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." Throughout that section, "the Court" evidently means the Court of Bankruptcy. Is not this "a question arising under the deed?" If the debtor has in any way misconducted himself, the Court of Bankruptcy may revoke his protection: and this Court will leave the creditor to that remedy, and will not lend itself to a motion the manifest object of which is to enable the sheriff to escape the peril of an action. In Ex parte Godden. In re Shettle, 32 Law J., Bankruptcy, 37, 1 De Gex, Jones & S. 260, Mr. Commissioner Holroyd having ordered the release of the debtor, on a deed of composition being registered, on appeal to the Lords Justices, Lord Justice Knight Bruce said: "In this case, which is one of an appeal from a most able and experienced commissioner, several points have been argued. One is, as to jurisdiction, with regard to which it was contended that the learned commissioner had not the power to make the order or to entertain the application in which it was made, there not having been an actual bankruptcy. That is a point which is certainly open to a difference of opinion. My opinion, on looking at

sections 192 and 198, and other parts of the Act of 1861, is, that the commissioner has jurisdiction, that it is not necessary to apply to a judge of one of the Courts at Westminster, and that the appellant's objection as to this point is not well founded, though I do not feel confident upon it. I will assume, however, that the respondent is so far right." In Ex parte Morrison, In re Clun, 33 Law J., Bankruptcy, 47, where a debtor having *no assets* executed a statutory composition-deed for the mere purpose of defeating a creditor who had recovered judgment against him, the Lord Chancellor, acting under the 198th section, on appeal against an order of Mr. Commissioner Fane, gave leave to *the creditor to issue execution on his judgment, notwithstanding the deed; saying,—"The assignment was a [*422 mockery, for there was actually nothing to assign, and it was impossible it could be for the benefit of the creditors." Walter *v.* Adcock, 21 L. J., Exch. 380, 7 Hurlst. & N. 541,† was also referred to.

Griffits, in support of his rule.—This is a question of great importance. There is a case now pending in the Queen's Bench, in which the Court has taken time to consider whether or not the sheriff is liable to an action for refusing to arrest a party under a ca. sa., where the deed had subsequently been held to be void. [ERLE, C. J.—You may assume that the Court will do all it can to protect the sheriff, and that primâ facie the sheriff would have a right to rely on the debtor's protection.] The Court of Bankruptcy, it is submitted, can have no right to interfere in any way with the process of this Court. Under the Bankruptcy Act, 1861, whatever the form of the deed, if the affidavit of its execution be duly made under the provisions of s. 192, and a certificate of registration granted, it protects the debtor from all process. [WILLES, J.—I cannot think that the registrar would file a deed which is obviously bad upon the face of it.] The registrar has no power to reject a deed which comes accompanied by the requisite affidavit. It is admitted that this deed is now inoperative, so that it could not be set up in answer to an action for the debt. There is no provision in the Bankruptcy Act enabling that Court to set aside the certificate of registration: it can only investigate the debtor's rights to property, if any. The order made by Pollock, C. B., in Daniels *v.* Gladstone was not appealed against. In a case of Re Harwood, 7 Law Times (N. S.) 171, the debtor having been arrested upon process issuing out of one of the Courts at *Westminster, Mr. [*423 Commissioner Fonblanque held that the application for his release must be made to the Court out of which the process issued. [WILLES, J.—That is a totally different matter. Either Court may discharge the party from custody. It is the common course, where a party claims to be privileged from arrest, to apply for his discharge either to the Court whose privilege is violated, or to the Court whose process is used in violation of the privilege.] In Baerselman *v.* Langlands, 34 Law J., Exch. 3, the Court of Exchequer held that a debtor arrested on a ca. sa. after executing a good deed of arrangement under s. 192, is, according to s. 198, entitled to his discharge from custody on the deed being duly registered. [ERLE, C. J.—We are all agreed as to the power to *discharge* the debtor. Here, the sheriff is asking this Court for advice. If we have no jurisdiction, our order would be merely delusive.] The Court of Bankruptcy cannot exercise any

control over the process of this Court. And, when the 198th section says that no process against the property or the person of the debtor shall be available to any creditor *without leave of the Court*, it must necessarily mean the leave of the Court out of which the process issues, which Court alone can exercise jurisdiction over such process.

ERLE, C. J.—I am of opinion that this rule should be discharged. The Bankruptcy Act, 1861, has enacted, that, where a deed framed in compliance with the provisions and conditions of the 192d section has been registered, and all the requirements of the statute have been duly complied with, the debtor and his property shall be protected from all process. The words are, that, after notice of the filing and registration of such deed, no execution, sequestration, or other process against the *424] debtor's property, in respect of any debt, *and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, *without leave of the Court*. The question is, what Court do these words refer to. The clauses to which our attention has been called, and especially the interpretation clause, to my mind clearly show that they refer to the Court of Bankruptcy. That Court would have power to suspend the debtor's protection, without at all interfering with the process of this Court. It would be merely removing an impediment. I am the more confirmed in this view, inasmuch as our order would afford the sheriff no protection: and I see no sign of any such jurisdiction being given to this Court under this statute. As Mr. *Kenealey* observed, the Court of Bankruptcy has a much wider jurisdiction in matters of this sort, and has the means of doing that which is for the substantial interest of the creditors as well as of the bankrupt. Here is a deed which was valid at the time of its execution, but which has subsequently become void by reason of the non-payment of the instalments. The Court of Chancery, administering its jurisdiction in bankruptcy, may make provision to enforce payment, and may deal with the bankrupt in a way in which we cannot. For these reasons, it seems to me that the application for leave to proceed under the 198th section must be made to the Court of Bankruptcy.

WILLIAMS, J., concurred.

WILLES, J.—As to the power to discharge the debtor, I consider that we are bound by authority. The cases I referred to as to privilege are collected in 1 Archbold's Practice, 11th edit. 770, 771, where *425] numerous *instances are given, of persons arrested under process of one Court, and discharged by another. As this protection of the debtor is in the nature of a privilege, looking at the very general terms in which all the powers and authorities of the superior Courts of law and equity are by the first section of the statute conferred upon the Court of Bankruptcy, I take leave to doubt whether, if that Court thought fit to exercise the discretion of ordering the release of a debtor in custody under process of one of the superior Courts, the sheriff would not be protected by it. But, at all events, it seems to me to be quite clear that the Court of Bankruptcy alone has power to grant leave to issue execution under the 198th section.

KEATING, J.—I am entirely of the same opinion. The Court of Bankruptcy is clearly the Court intended in s. 198 and in the several

sections in immediate connection therewith. That Court alone can give leave to make the process available either against the property or the goods of the debtor.

ERLE, C. J.—As the rule asks for costs, it must be discharged with costs. Rule accordingly.

*HOGG *v.* SKEEN and VINCENT. *Jan.* 19. [*426

1. To an action by an endorsee against A. and B. as the acceptors of a bill of exchange, B. having suffered judgment by default, A. pleaded that he did not accept the bill. At the trial, it was proved that A. and B. were partners, and that the bill had been accepted by B. in fraud of the partnership articles, without the knowledge of A., and for his own private purposes:—Held, that this cast upon the plaintiff the burthen of showing that he gave value for the bill.
2. Musgrave v. Drake, 5 Q. B. 185, Dav. & Mer. 347, distinguished.

THIS was an action by the endorsee of a bill of exchange against the acceptors.

Vincent, one of the defendants, suffered judgment by default. The other defendant, Skeen, pleaded that he did not accept the bill.

At the trial before Willes, J., at the sittings in London after last Trinity Term, it appeared that the bill was accepted by Vincent in the name of the firm, but without authority from his partner, and in violation of the terms of the articles of partnership, which were produced. There was no evidence that the plaintiff had notice of the partnership deed or that the bill was not accepted for the purposes of the firm: and the only evidence that he gave value for the bill, was, the statement of his attorney that he gave Vincent a check for the amount of the bill (which was 38*l.* 17*s.* 6*d.*) less 15*s.* for discount. The check, however, was not produced; and the plaintiff was not present to explain the transaction. It did not appear that the plaintiff had ever had any other dealing with the firm.

On the part of the plaintiff it was submitted, that, to negative his right to recover upon the bill, it was incumbent on the defendant to show affirmatively that the plaintiff knew, or had reason to suspect, that it was drawn in fraud of the partnership, and that he took it without value.

The learned Judge left it to the jury to say whether or not the plaintiff had given value for the bill. They found for the defendant.

C. Pollock, in pursuance of leave reserved to him at the trial, subject to the condition that the matter *should not go beyond this Court, in Michaelmas Term last, obtained a rule to show cause [*427 why the verdict should not be entered for the plaintiff, on the ground that, there being no evidence as to notice to the plaintiff or want of consideration, the plaintiff was entitled to the verdict; or for a new trial, on the ground that the verdict was against the evidence. He referred to Musgrave *v.* Drake, 5 Q. B. 185, Dav. & Mer. 347.

Griffits now showed cause.—It is clear that Vincent had no right to accept bills in violation of the partnership deed: and the question whether the plaintiff had given value was a question for the jury, and that is disposed of by their finding. On the subject of notice, it is laid down in Byles on Bills, 8th edit. 113, that "a wilful and fraudulent abstinence from inquiry into the circumstances (and it has even been said by the Court of Queen's Bench that gross negligence may be

evidence of fraud—Goodman *v.* Harvey, 4 Ad. & E. 870 (E. C. L. R. vol. 31), 6 N. & M. 372 (E. C. L. R. vol. 36), where they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill) amount to general or implicit notice,"—citing Oakley *v.* Ooddeen, Guild. C. P. Nov. 1861, Jones *v.* Smith, 1 Hare 55, Ware *v.* Lord Egmont, 4 De Gex, M'N. & G. 473, and The Attorney General *v.* Stephens, 6 De Gex, M'N. & G. 111. [KEATING, J.—That question does not arise here. The jury have negatived value. ERLE, C. J.—The bill is shown to be tainted with illegality: and the jury have found that the plaintiff gave no value. We must hear what can be said in support of the rule.

C. Pollock.—The acceptance was proved: and the plaintiff's attorney proved that a check was given for the amount of the bill less the discount. On the *part of the defendant, it was proved that the acceptance of the bill by Vincent was in fraud of the partnership articles: but there was no evidence upon the defendant's case of the circumstances under which the plaintiff received the bill. Musgrave *v.* Drake is precisely in point. That was an action by an endorsee against the acceptors of a bill of exchange. One of the defendants suffered judgment by default. The others pleaded that they did not accept. It was proved that all the defendants were partners, and that the defendant who had suffered judgment by default had accepted the bill in the name of the firm, in fraud of the partnership, and not for partnership purposes: and it was held that such proof, without evidence of knowledge on the part of the plaintiff, did not, under this issue, oblige the plaintiff to prove the circumstances under which the bill was endorsed to him. In giving the judgment of the Court, Lord Denman said: "We have taken pains to ascertain what, as understood in the other Courts, would be the course at Nisi Prius on the trial of such an issue as this. We find that the other Courts agree in our view; which is this. Where issue is joined on a plea of non accepit, and the proof offered of the acceptance, is, the signature of the partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." A distinction is there made between a transaction which is altogether fraudulent, and an acceptance which is a violation of the contract of partnership. [WILLES, J.—The case turned upon a point of pleading: no question was reserved. KEATING, J.—In Byles on Bills, 44, note (*u*), it is said that *"the case of Grant *v.* Hawkes, Chitty on Bills (10th edit.) 42, does not appear to have been brought to the notice of the Court."] Grant *v.* Hawkes is only to be found in Chitty on Bills, and as Byles, J., observes, it is distinguishable. The question as to the amount of evidence required to put the plaintiff to proof that he has given value for the bill, was much discussed in Smith *v.* Braine, 16 Q. B. 244 (E. C. L. R. vol. 71). But here the acceptance was in the ordinary name of the firm; and there was nothing upon the face of it to excite suspicion. Then, as to the evidence. All that the defendant proved, was that the bill was accepted in violation of the partnership articles entered into between

*428]

*429]

him and Vincent and without his consent. There was nothing to show that the plaintiff took it out of the ordinary course of business. [WILLES, J.—It did not appear that the plaintiff had had any previous dealings with the firm. Unless he showed that he had given value for the bill, therefore, he could have no title.] The only defect in the plaintiff's case was, that he had not the check in Court which his attorney swore was given for the bill. That clearly was not enough to justify the jury in coming to a conclusion which almost amounts to a perverse verdict.

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought by the holder of a bill of exchange against the acceptors: and there is a plea of non accepit by one of the defendants; the other having suffered judgment by default. The evidence was, that Skeen and Vincent were partners, and that the bill in question was, in fraud of the partnership articles, accepted by Vincent in the name of the firm, and not for partnership purposes. The question is whether that cast upon the plaintiff the burthen of proving that he had given value for the bill. *I consider it to have been established by a long course of precedents, that, on proof being given [*430 that the bill is tainted with fraud in its inception, the burthen is thrown upon the party who seeks to enforce payment, to show that he gave value for the bill. And this I consider to be a most salutary rule, for the prevention of fraud and wrong against an innocent party. Mr. *Pollock* has relied on the case of Musgrave *v.* Drake, 5 Q. B. 185 (E. C. L. R. vol. 48), Dav. & Mer. 347, where the bill was tainted with this particular description of fraud. There the action was, as here, by the endorsee against the acceptors, and, under a plea of non accepit, it was proved that the defendants were partners, and that one of them (who had suffered judgment by default) had accepted the bill in the name of the firm, in fraud of the partnership deed, and not for partnership purposes: and the Court of Queen's Bench held that such proof, without evidence of knowledge on the part of the plaintiff, did not, under the issue on non accepit, oblige the plaintiff to prove the circumstances under which the bill was endorsed to him. The judgment, however, proceeds entirely on the effect of that plea: the Court do not affect to raise a doubt as to that which I have stated to be the rule of law upon the subject. At that period, there had been great variation of opinion amongst the Judges as to what was put in issue by that particular form of plea: and the judgment was not properly the judgment of the Court of Queen's Bench. It begins with a recital of a talk with the other Judges: and we know from experience that on such casual conversations with reference to some particular matter, there is always great danger of the real point in issue being lost sight of. Speaking for myself, I must say I should have placed more reliance on that case if it had been the unassisted judgment of the Court of Queen's Bench. Lord Denman gives the result of the conference thus:—*"Where issue is joined on a [*431 plea of non accepit, and the proof offered of the acceptance, is, *the signature of the partner competent to bind the firm*,"—which is not the case here,—"then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet, if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the

plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." The effect of that judgment, as my Brother Willes suggested, is, merely to settle the point of pleading, and not in any way to interfere with the ordinary rule of law, that, wherever it is shown that the instrument is tainted with fraud, the party who seeks to enforce his remedy upon it must show that he received it for value. As to that part of the rule which seeks to set aside the verdict on the ground that it is against the evidence, having consulted my Brother Willes, I find that he is not dissatisfied. That part of the rule, therefore, also fails.

WILLIAMS, J.—The principles which affect this case, as to the necessity for the plaintiff's showing that he gave value for the bill, where the defendant has made out a primâ facie case of fraud in its inception, are so familiar that it was impossible for Mr. *Pollock* to have made any show of argument, but for the case of Musgrave *v.* Drake, 5 Q. B. 185, Dav. & Mer. 347. I entirely agree with my Lord that the question there involved was a question of pleading only. The Court assume, that, if the plaintiff had no knowledge of the signature being in fraud of the other partners, the fact of his having given value for the bill was not material, not being involved in the issue on non accepit; but they seem to say it would have been otherwise if the *432] plaintiff had been affected with the knowledge of the *fraud, because, under those circumstances, one partner has not primâ facie authority to accept bills in the name of the firm, as against one who has notice or knowledge of the fraud. No question, however, arises here as to the form of the pleadings.

KEATING, J.—I am of the same opinion, and for the same reasons.

WILLES, J.—I am of the same opinion. As to the case of Musgrave *v.* Drake, 5 Q. B. 185, Dav. & Mer. 347, I think it right to say that I think it distinguishable from the present case. That appears to have been the simple case of a partner who primâ facie had authority to accept bills in the name of the firm of which he was a member, accepting a bill in the partnership name in fraud of his partners and for his own private purposes: and I cannot help thinking that the Court of Queen's Bench, in its desire to narrow the issue, for the sake of convenience, omitted to consider what would be the effect of their decision upon the general law upon the subject. I am satisfied that that Court would not have come to the conclusion they there did in a case like this, where the partner who accepted the bill in the name of the firm never could have had authority so to accept. But, I disclaim proceeding upon that distinction, because, treating Musgrave *v.* Drake as a decision upon a question of pleading, I cannot assent to the principle there laid down. The reason why, in the case of a partnership, a party is bound by an acceptance which is not his own, but that of his co-partner, is a reason founded on the law of estoppel in pais. Having consented to the exercise by another of an apparent authority to accept bills so as to bind him (even though such authority has been fraudulently exercised), as against a person who has taken the bill *433] bonâ *fide and without notice of the fraud, the acceptor is estopped from denying the acceptance. Therefore, on a plea denying the acceptance, it seems to me to be a contradiction to say that you may go into the question whether he is estopped or not by reason of

the holder of the bill being a holder without notice, but that you cannot go into the question of estoppel by reason of the party having given no value for the bill. The defendant must, I think, be at liberty to go into the one question, if he may into the other. Musgrave *v.* Drake shows that he may go into the one inquiry. If that be so, the question resolves itself into a question upon whom is cast the burthen of proof. I would only add a reference to Byles on Bills, where the learned author lays it down with his usual distinctness, that, where the bill is infected with fraud or illegality in its inception, the holder must show that he gave value. As to the burthen of proof, the rule is laid down clearly at p. 111:—"As soon as it appears to the jury by the defendant's evidence that the bill was originally infected with fraud or illegality, then it is plain that the original holder's title being destroyed, the title of every subsequent holder which reposes on that foundation and no other, falls with it. Hence, it appears that the plaintiff, the transferree, can then have no title till he shows that he or some other holder under whom he claims gave value for the bill,"—citing Smith *v.* Martin, 9 M. & W. 304,† Bailey *v.* Bidwell, 13 M. &. W. 73,† and Harvey *v.* Towers, 6 Exch. 656.† "Therefore, where the question is thus raised whether the transferree be a holder for value, it is not for the defendant to prove the absence of value, but for the plaintiff, the transferree, to prove value given either by himself or by some under whom he claims." I would also refer to the way in which the learned author deals with the case of Musgrave *v.* Drake. At p. 44, he says: "The proper *mode of raising the defence of unauthorized and fraudulent acceptance by one partner, and notice to the plaintiff, is, [*434 by a traverse of the acceptance,—Jones *v.* Corbett, 2 Q. B. 828; Grout *v.* Enthoven, 1 Exch. 382.† If the defendants show that the bill was circulated in violation of partnership articles, it has been held that they will thereby put the plaintiff to prove that he gave value for it,—Grant *v.* Hawkes, Chitty 42. But it seems from a recent decision in the Court of Queen's Bench, after conference with the Judges of the other Courts, that, in order to maintain the action, where it appears that one partner has accepted in fraud of his copartners, *where issue is taken on the acceptance*, it is not necessary for the plaintiff to prove that he gave value, but the defendants must affect the plaintiff with notice of the fraud, or otherwise impeach his title,"—Musgrave *v.* Drake. And in the note he adds: "The case of Grant *v.* Hawkes, however, does not appear to have been brought to the notice of the Court, though, perhaps, distinguishable." The learned author puts the words "where issue is taken on the acceptance" in italics, from which it appears that he treats it as a question of pleading, or as an exception to the general rule, by reason of its being narrowed by the form of the issue. As to the other part of the rule, it was entirely a matter for the consideration of the jury: and I cannot say that I am dissatisfied with the verdict.

Rule discharged.

*435] *NEILL and Another *v.* WHITWORTH and Others. *Jan.* 26.

A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at L. per ship or ships from C. The contract contained provisions as to quality, and for a reference in case of dispute; and then followed these words,—"*The cotton to be taken from the quay:* customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale:"—Held, that the stipulation as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay.

THIS was an action for an alleged breach of a contract for the delivery of certain cotton.

The declaration stated that the defendants bargained and sold to the plaintiffs, and the plaintiffs bought of the defendants, certain cotton, that is to say, 500 bales of cotton, guaranteed to be October shipment, at 15½*d.* per lb., to arrive from Calcutta in Liverpool per ship or ships, and to be fair Bengal cotton: *the said cotton to be taken from the quay:* customary allowances of tare and draft; and the invoice to be dated from the date of the delivery of the last bale. The said cotton to be in merchantable condition: the damaged, if any, to be rejected, provided it could not be made merchantable. Should the said cotton be transhipped into other vessels arriving, the contract to hold good: but if any of the vessels should be lost, the contract to be void so far as regarded such ships only. Payment for the said cotton to be made in cash within ten days, made equal to ten days and three months; and cash on account to be paid before delivery, if required. Averment, that all conditions were fulfilled and all things happened, and all times elapsed necessary to entitle the plaintiffs to the delivery of the said cotton as agreed: Breach, that the defendants made default in delivering the said cotton, as agreed; whereby the plaintiffs had lost and been deprived of the profits which would have accrued to them from the delivery of the said cotton, and were prevented from fulfilling a contract entered into by them for the resale of the said cotton, and thereby lost great gains and profits, &c., and by reason of the premises the plaintiffs incurred expenses in and about endeavouring *to procure the delivery of the said cotton by the defendants, as agreed.

*436]

The defendants pleaded,—first, that the defendants did not bargain and sell to the plaintiffs, and the plaintiffs did not buy from the defendants, the cotton in the declaration mentioned, upon the terms therein alleged,—secondly, that the defendants did not make default in delivering the cotton in the declaration mentioned, as therein alleged,—thirdly, that the plaintiffs were not ready to accept the cotton. Issue thereon.

The cause was tried before Pigott, B., at the last Summer Assizes at Liverpool, when the following facts were taken by consent on the learned Judge's note:—The plaintiffs were merchants in London; the defendants were merchants at Manchester; and both dealt largely in cotton. On the 2d of October, 1863, the defendants, through their brokers, Trueman & Rouse, sold to the plaintiffs 500 bales of cotton, at 15½*d.* per lb. The bought note was as follows:—

"Bought for account of Messrs. Neill, Brothers, of B. Whitworth

& Brothers, Manchester, 500 bales of cotton, at 15½*d.* per lb., guaranteed October shipment, to arrive in Liverpool per ship or ships from Calcutta.

"The cotton guaranteed fair Bengal. Any slight variation in mark not to vitiate this contract. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made.

"*The cotton to be taken from the quay:* customary allowance of tare and draft; and the invoice to be dated from date of delivery of last bale.

"To be in merchantable condition; the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transhipped into other vessels arriving, the contract to hold good: but, *if any of the vessels be lost, the contract to be void, so far as regards such ships only. [*437

"Payment, cash within ten days, made equal to ten days and three months. Cash on account, before delivery, if required.

"TRUEMAN & ROUSE."

On the 28th of October, 1863, the plaintiffs resold the cotton to one Clarke, through the same brokers, at 18½*d.* per lb.

On the 8th of January, 1864, the defendants declared the Talavera and the Fort George as the ships by which the cotton was to arrive,—250 bales by each. The Talavera arrived at Liverpool on the 3d of February, with a cargo of cotton which was landed on the quay there, and subsequently warehoused. Application was made on the part of the plaintiffs for delivery orders, but none were given or tendered until after the cotton had been carried to the warehouse. By the dock regulations at Liverpool, the authorities have power to warehouse all goods after they had been twenty-four hours on the quay.

The Fort George was stranded in Carnarvon Bay, and her cargo was landed there, and forwarded by railway to Liverpool. Arrived there, it was put into the "wreck transit sheds" on the quay, which is considered as part of the quay. The 250 bales ex Fort George were afterwards removed from the wreck transit sheds to the warehouse.

On a subsequent day, the vendors (the defendants) offered to deliver the whole 500 bales from the warehouse, but at quay weights, and without any charge for warehousing, or to cart them back to the quay and deliver them there. The plaintiffs, however, refused to take them, insisting that the defendants had broken their contract by allowing the cotton to be warehoused, instead of delivering it on arrival "from the quay."

*A verdict was taken for the plaintiffs, with 2109*l.* 7*s.* 6*d.* damages,(*a*) leave being reserved to the defendants to move to enter a verdict for them, or to reduce the damages,—the Court to be at liberty to draw such inferences of fact as a jury might have drawn, and to make all such amendments as the Judge at Nisi Prius might have done. [*438

Brett, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendants, or to reduce the damages, on the grounds, as to the first point, that the stipulation in the con-

(*a*) The difference between the contract-price (15½*d.*), and the price at which the plaintiffs had resold the cotton to Clarke (18½*d.*),—the average weight of a bale of cotton being 3 cwt.

tract that *the cotton should be taken from the quay*, was in favour of the vendors, or, if not, that it was *a stipulation only*, and not a *condition* in the contract; and, as to the second point, that the damages should be either nominal or at most the difference between the contract-price and the market-price on the day of the breach. He submitted that, inasmuch as the plaintiffs might without any expense have had the very cotton contracted for at the price agreed on, viz. 15½*d.*, they could only be entitled to nominal damages for the defendants' breach of contract: but that, in any event, they could not have more than the difference between the contract-price and the price at which they might have bought similar cotton in the market on the day of the breach, which was proved to be 17*d.*

Edward James, Q. C., *Mellish*, Q. C., and *Baylis* now showed cause.—By the terms of the contract, the plaintiffs were entitled to have the cotton in question delivered to them from the quay, which would limit it *to twenty-four hours after the landing, that being the time which by the regulations of the docks goods are permitted to lie upon the quay, after which they are warehoused at the expense and risk of the owner: and the plaintiffs by their contract bound themselves in the same terms to deliver to their sub-purchaser. The defendants had notice of the sub-contract, and consequently were aware of the importance of such a delivery as would enable the plaintiffs to perform it. The stipulation for delivery from the quay was an essential part of the contract, binding the sellers to deliver and the buyers to take the cotton from the quay; and was not, as is contended on the part of the defendants, a mere stipulation introduced in favour of the sellers; for, if so, there would be no time or place provided for the delivery at all. This form of expression occurs in the contract in Moore *v.* Campbell, 10 Exch. 323.† The more difficult question is, what is the proper measure of damages,—the difference between the contract-price (15½*d.* per lb.) and the price at which the plaintiffs had resold the cotton,—the difference between the contract-price and the market-price of the day on which the default in delivery of the cotton was made,—or nominal damages, because the cotton contracted for was actually tendered within three days of the landing, free of expense, and so the vendees sustained no damage? If the plaintiffs could have gone into the market and obtained cotton which would have enabled them to perform their contract with their sub-vendees, it may be conceded that they would only have been entitled to the difference between the contract-price and the market-price of the day. But here, relying upon the defendants' performance of their contract, they have made a contract which they could not possibly fulfil. They are therefore entitled to damages computed by the difference between the contract-price and the price at *which they resold,—these being the damages which must be considered as fairly and reasonably resulting according to the usual course of things from the breach of the contract: Waters *v.* Towers, 8 Exch. 401;† Hadley *v.* Baxendale, 9 Exch. 341;† Dalton *v.* The South Eastern Railway Company, 4 C. B. N. S. 296 (E. C. L. R. vol. 93); Hoey *v.* Felton, 11 C. B. N. S. 142 (E. C. L. R. vol. 103). At all events, the plaintiffs would, on all the authorities, and more especially according to the rule laid down by Willes, J., in Borries *v.* Hutchinson, post, p. 445,

*439]

*440]

be entitled to the difference between the contract-price and the market-price on the day of breach.

Brett, Q. C., and *Holker*, in support of the rule.—Two questions arise in this case,—first, whether the defendants were guilty of any breach of contract,—secondly, what damages the plaintiffs are entitled to recover. The action is for the non-delivery of cotton, to arrive; and it is an admitted fact that the defendants did give the plaintiffs a delivery order before the commencement of the action. The contention on the part of the plaintiffs is, that the defendants did not deliver the cotton at the time and place when and where they bound themselves by their contract to deliver it. By the terms of the contract, the buyers were to take the cotton "from the quay." That, it is submitted, does not amount to a condition binding the sellers to deliver on the quay, but merely to a stipulation for their advantage, that, if they choose so to deliver, the vendees shall be there ready to receive it; the object being that the vendors shall not be at the charge of warehouse-rent, risk of fire, and the like. The distinction between stipulations which are conditions precedent and those which may be compensated for by damages in a cross-action is very elaborately discussed by Williams, J., in a judgment *delivered by him in the Exchequer Chamber in a case of Behn *v.* Burness, 32 Law J., Q. B. 204, the result of which shows that this was a mere stipulation introduced for the benefit of the sellers. Whether particular terms of delivery amount to a condition precedent or not, depends, according to the judgment of Lord Ellenborough in Ritchie *v.* Atkinson, 10 East 295, 306, "not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract." The like rule is laid down in Abbott on Shipping, Part 4, ch. 1, § 5: and see Tarrabochia *v.* Hickie, 1 Hurlst. & N. 183,† and Jonassohn *v.* Young, 32 Law J., Q. B. 385. At all events, the utmost the plaintiffs could be entitled to recover would be nominal damages. [*441

Erle, C. J.—I am of opinion that this rule should be made absolute to enter a verdict for the defendants. The action is brought for the non-delivery of 500 bales of cotton pursuant to contract. The defendants plead that they did not make default, and that the plaintiffs were not ready to accept the cotton. The objection urged on the part of the plaintiffs, was, that the contract contained a condition precedent which was not performed by the vendors, and therefore that they, the plaintiffs, are entitled to maintain this action: and the question is, whether the contract between the parties does contain a condition precedent to be performed by the vendors before they could call upon the vendees to accept the cotton. The words relied on as constituting a condition precedent are, "The cotton to be taken from the quay." It was in fact landed and warehoused: and the plaintiffs, finding that it had been taken to the warehouse, refused to receive it, although the defendants offered to deliver it to them at quay weights, and even to cart it back to *the quay free of expense. The law upon the subject of what does and what does not amount to a condition precedent, or only to an independent stipulation, is laid down with much clearness by my Brother Williams in a very elaborate judgment delivered by him in the Ex- [*442

chequer Chamber in the recent case of Behn v. Burness, 4 Best & Smith 296 (E. C. L. R. vol. 116). The distinctions there pointed out are well worthy of attention. Looking at the contract now before us with the light afforded by that case, I am of opinion that the clause in question constitutes an independent stipulation introduced solely for the benefit of the vendors, and therefore is matter on which the vendees cannot rely as amounting to a condition precedent. See the nature of the contract. It is a contract by bought and sold notes for 500 bales of cotton to arrive, at a certain price and of a certain quality. Then comes a stipulation, that, "in case of dispute arising out of this contract, the matter shall be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made." Then come the words in question,—"The cotton to be taken from the quay." This comes after the more operative words, and among some provisions which are inserted in favour of the vendors. Looking at the nature of the stipulation itself, I cannot see how it can be of any importance to the vendees whether they receive the cotton from the quay or from the warehouse, provided the warehousing does not impose on them any additional expense or undue delay. It seems to me to be perfectly clear that it was a stipulation inserted for the benefit of the vendors, to enable them to call upon the vendees to take the cotton from the quay, in order to save them expense. I am also clearly of opinion that it was not intended to operate as a stipulation for time. There is nothing to show that the whole number of bales *stipulated for were to be delivered out of the ship the moment she arrived: they might be the first 250 unloaded, or the last. I see nothing, therefore, in the stipulation which points to the time of delivery, or shows that it was for the benefit of the vendees: and I do see very good reason why the vendors should make it. I am therefore of opinion that it was not a condition precedent, that there has been no breach of the contract on the part of the vendors, and consequently that this action will not lie.

*443]

WILLIAMS, J.—I am of the same opinion, and for the same reasons.

WILLES, J.—I am of the same opinion. It struck me at first that the expression "the cotton to be taken from the quay" must be construed as a stipulation on the one hand, accompanied by a corresponding promise on the other, that the delivery should take place upon the quay, and that, unless the vendors were ready to deliver the cotton there, they failed in the performance of their contract, and would be liable for all the consequences of such failure. But, upon consideration, I am satisfied that that literal construction of the words would be an incorrect one. There are several reasons for holding that it could not have been so intended. The stipulation does not affect the identity of the cotton, or its quantity, or its quality,—as, for instance, that it should be cotton from Mobile or from New Orleans, or the like. Then, does it amount to a stipulation as to time? Without it, the contract would stand as a contract for the delivery of the cotton within a reasonable time. The words were evidently introduced with reference amongst other things to who was to be at the charge of the warehouse-rent, insurance &c. These

would otherwise have been at *large. There was, therefore, a manifest use for the words "the cotton to be taken from the quay." The meaning of them is, that the quay is to be taken as the place at which the delivery is to be made. This construction is fortified by the provision made for the usual allowances, and the stipulation that the invoice is to date from the delivery of the last bale. That must mean from the time the last bale is landed on the quay. The contract, therefore, stands as a contract for the delivery of the cotton in a reasonable time and under reasonable circumstances, the cotton to be at the buyer's charge from the time it is landed on the quay. That seems to me to be the proper construction; and it is the construction which the sellers have put upon it. They offered to deliver the cotton to the buyers on the same terms as if it had been delivered on the quay: nay, more, the vendors offered to take it back to the quay, so as literally to comply with the words of the contract. For these reasons, I am of opinion that the rule should be made absolute to enter the verdict for the defendants. [*444

KEATING, J.—I am of the same opinion. I think, after hearing the argument, it is quite clear that the words in question were introduced as a stipulation in favour of the vendors. The place where they are found seems to me to make this quite obvious. The meaning is, that the vendees shall be bound to take the cotton from the quay, provided the vendors were ready to deliver it there. The words were in all probability introduced in order to get rid of any question as to which party was to bear the expenses to be subsequently incurred. That seems to me to be the only sensible construction of the contract.

Rule absolute accordingly.

---

*BORRIES and Others *v.* HUTCHINSON. *Jan.* 19. [*445

The defendant contracted to sell to the plaintiffs 75 tons of caustic soda,—a commodity not ordinarily procurable in the market,—at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, and 25 tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered 26 tons in all.

At the time of entering into the contract, the defendant was aware that the plaintiffs were buying the soda for a foreign correspondent, but did not know until the end of August that it was destined for St. Petersburg.

The plaintiffs had in fact contracted to sell the soda to A., a merchant at St. Petersburg, at an advanced price; and A. had contracted to sell it to B., a soap-manufacturer at that place, for a still further advance.

In consequence of the late delivery of the 26 tons, the plaintiffs were compelled to pay a higher rate of freight and insurance. This amounted to 40*l.* 17*s.* For their failure to deliver the remainder to A., they were called upon to pay and actually paid 159*l.*, which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him.

In an action by the plaintiffs to recover from the defendant damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the 49 tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to A.,—in other words, the loss of profit on the resale: and,

Held, that they were also entitled to recover the 40*l.* 17*s.*, the excess of freight and insurance, which was the necessary result of the defendant's breach of contract; but that the defendant was not chargeable with the 159*l.* which the plaintiffs had paid to A. to compensate B. for the loss of his bargain,—this being too remote a damage.

THIS was an action for the breach of a contract for the sale of a quantity of caustic soda.

The declaration stated that the plaintiffs bargained with the defendant and agreed to buy of him a large quantity, to wit, 75 tons, of his best caustic soda, strength guaranteed not to be less than 70 per cent. in 5 cwt. iron casks or 3 cwt. wooden casks, at the plaintiffs' option, at the price of 16*l.* 5*s.* per ton free on rails at Widness Dock, less 2½ per cent. discount and 1 per cent. commission: payment, cash fourteen days after delivery: shipment to be, 25 tons in June, 25 tons in July, and 25 tons in August: Averment, that all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to the delivery of the said caustic soda: Breach, that the defendant did not deliver the same to the plaintiffs; and the plaintiffs, by reason of the premises, had been hindered and prevented from performing a certain other contract made by them with one Heitmann, of St. Petersburg, for the sale to him of the said caustic soda at greatly increased prices, which *last-mentioned contract was made on the faith of the agreement by the defendant; and by reason of the premises the plaintiffs had been obliged to pay a much larger sum for freight and insurance than they otherwise would have done if the defendant had performed his said contract, and had incurred other losses, and were liable for other damages, &c.

*446]

The defendant paid 52*l.* 5*s.* 4*d.* into court, averring that that sum was sufficient to satisfy the claim of the plaintiffs; which they by their replication traversed; and thereupon issue was joined.

The cause was tried before Willes, J., at the second sitting in London in Michaelmas Term last. The facts were as follows:—On the 11th of May, 1863, the defendant, who was an alkali manufacturer at Liverpool, sold to the plaintiffs, who were merchants at Newcastle-upon-Tyne, 75 tons of caustic soda, to be delivered free on the rails for Hull, 25 tons in June, 25 tons in July, and 25 tons in August, at 16*l.* 5*s.* per ton. The contract was made by letters, which letters and some subsequent correspondence between the plaintiffs and the defendant showed that the plaintiffs were to the knowledge of the defendant buying the article for shipment to "friends on the continent." The plaintiffs had in fact made a sub-contract with one Heitmann, a merchant of St. Petersburg, to supply him with the article in question, to be shipped at Hull, at 17*l.* 10*s.* per ton, and had made arrangements for its shipment for the Baltic at the times above mentioned."

No part of the caustic soda was delivered by the defendant until September, between the 16th and the 26th of which month several deliveries took place, in the whole amounting to 26 tons, which were shipped by the plaintiffs for St. Petersburg in pursuance of their contract with Heitmann; but in consequence of the advanced season, this was done at an increased *rate for freight and insurance to the extent of 40*l.* 17*s.* (being 35*l.* 15*s.* for freight, and 5*l.* 2*s.* for insurance) beyond what they would have had to pay if the shipments had been made before the end of August.

*447]

It was admitted that caustic soda is not an article which is kept in stock, so as to be capable of being at any time bought in the market like most other articles of commerce, consequently there was no

ascertainable market-price; hence, the defendant paid into Court enough to cover the difference between the price the plaintiffs had contracted to pay him for the caustic soda and the price at which they had contracted to sell the article to Heitmann.

The plaintiffs, however, further claimed to be entitled to recover as damages the increased freight and insurance which they had been obliged to pay by reason of the lateness of the shipment. They also claimed to be entitled to a further sum of 159*l.* for the loss of Heitmann's profit upon the 49 tons undelivered, and a compensation which Heitmann had been obliged to pay (and which they had repaid him) for the non-performance of *his* contract with one Heinburger, a soap and candle manufacturer at St. Petersburg, to whom he had contracted to sell the caustic soda,—of which contract the defendant had notice by the correspondence, but not at the time he made his contract with the plaintiffs.

On the part of the defendant it was submitted that these two last-mentioned items of damage were too remote; and that the mention of "our friends on the continent," in the correspondence which took place concerning the contract, at the utmost amounted only to an intimation to the defendant that the plaintiffs were buying as agents for a foreign merchant.

The learned Judge was inclined to think that the plaintiffs were entitled to recover in respect of the *extra cost for freight and [*448 insurance occasioned by the delay, but not for the loss by reason of the sub-contract entered into by Heitmann with Heinburger.

The jury returned a verdict for the full sum claimed,—199*l.* 17*s.*; and the learned Judge reserved leave to the defendant to move to reduce the damages, the Court to be at liberty to draw such inferences as the jury might have done.

Brett, Q. C., in the course of the term, obtained a rule nisi accordingly.

S. Temple, Q. C., and *Udall*, now showed cause.—The plaintiffs were entitled to be reimbursed by the defendant all the loss and expense they had sustained through his breach of contract. It was conceded that there was no market to which the plaintiffs could have resorted, on the defendant's failure to supply the article contracted for; therefore the ordinary rule cannot apply here. The defendant had notice from the correspondence that the damages now claimed would be the natural and necessary result of the breach of his contract. The extra freight and insurance became necessary from the lateness of the delivery at Hull of the 26 tons which were delivered: and, when a man contracts to sell goods to a merchant, he is necessarily cognisant of the fact that they are bought for the purpose of resale, or to supply orders already received. [WILLES, J.—The sale by Borries & Co. to Heitmann was not made with any reference to the particular terms of their contract with Hutchinson.] We are justified in assuming that Heitmann bought from the plaintiffs upon the same terms (except as to price) on which the plaintiffs bought of Hutchinson. [ERLE, C. J.—It is not to be assumed, because the buyer is a merchant, he will contract to sell on and on before *he has possession of the goods.] Such is the [*449 invariable practice in every market. The rule, as laid down by Alderson, B., in delivering the judgment of the Court in Hadley *v.* Baxendale, 9 Exch. 341, 354,†—and which has since received almost

universal assent,—is, that, "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In Randall *v.* Raper, Ellis, B., & Ellis 84, the plaintiffs, corn-factors, bought of the defendant a quantity of barley which was warranted to be seed barley of a particular quality, and in the course of their trade resold it, with a like warranty, to third persons, who sowed it on their land, believing that it was of the description warranted. The crop which came up was of an inferior kind of barley, and claims were made upon the plaintiffs by their vendees for compensation in respect of the damage which they had suffered, and the plaintiffs agreed to satisfy them, but no sum was fixed. In an action by the plaintiffs against the defendant, it was held (Wightman, J., hæsitante) that they might recover the amount of damage which their vendees had sustained, they being liable to pay it, though they had not actually done so. In giving judgment, Lord Campbell says: "The true rule is, that you must show that the damage which is sought to be recovered naturally arose from the breach of contract of which you complain. Suppose the plaintiffs had paid according to the liability which they had incurred, it would have *450] *been a natural, probable, and necessary consequence of the breach of the contract, for, the defendant sells the barley as Chevalier seed barley, and the purchaser sells it again with the same description. If it be sown, and turns out not to be Chevalier seed barley, it will not produce that quality of grain which was warranted not on account of climate, or soil, or weather, but because seed will produce the same product, and the difference in value will be a necessary loss, and one which naturally arises from the breach of contract by the defendant. Therefore, the defendant having warranted the barley as Chevalier seed barley, if the plaintiffs had been sued, and had been obliged to pay damages, there is no doubt that they could have recovered them again. But then it is said that here there has only been a claim, no action having been brought, or any sum paid. It would be a great hardship if we were to say that the liability to pay damages was not enough to enable the plaintiffs to recover; and no case can be found where it has been decided that there must be more than a liability." [ERLE, C. J.—It is agreed on all hands that the loss of profit upon the first resale (to Heitmann) is recoverable.] That which is said by Parke, B., in the course of the argument in Hadley *v.* Baxendale, 9 Exch. 346,† is abundantly sufficient to show that the plaintiffs are entitled to recover the whole of the damages which they now claim. "The sensible rule," he says, "appears to be that which has been laid down in France, and which is declared in their code.—Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick, p. 67,—'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the

damages *foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract.'" The rule is well laid down by an eminent American Judge (Selden, J.), in a case of Griffin *v.* Colver, 2 Smith's New York Rep. 489, 494,—"It is an error to suppose that 'the law does not *aim* at complete compensation for the injury sustained,' but 'seeks rather *to divide than satisfy* the loss' (Sedgwick, ch. 3). The broad general rule in such cases, is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. The familiar rules on the subject are all subordinate to these: for instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last. These two conditions are entirely separate and independent, and to blend them tends to confusion." [ERLE, C. J.—That is, such damages as may naturally be expected to follow and are certain to follow a breach of the contract.] The *general rule is also stated by Tindal, C. J., in delivering the judgment of the Exchequer Chamber in Barrow *v.* Arnaud, 8 Q. B. 604, 609 (E. C. L. R. vol. 55), as follows:—"Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is, the difference between the contract-price and the market-price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied; for, the seller may take his goods into the market and obtain the current price for them." But that rule is inapplicable to a case like this, where there is no market-price, and no possible means of obtaining other goods, so as to enable the purchases to perform the sub-contract. In Dunlop *v.* Higgins, 1 House of Lords Cases 381, the measure of damages in an action for breach of contract in the sale of goods, is held to be not merely the amount of the difference between the contract-price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed. [WILLES, J.—Mr. Mayne, observing upon that case (Mayne on Damages 18), says: "It may be as well to state, that, according to the Scotch law, loss of profits may be included in the estimate of damages. It was on this ground that Dunlop *v.* Higgins was decided in the House of Lords. It was an appeal from a Scotch Court: and it was held, that, in an

[*451

[*452

action in that country for non-delivery of goods according to contract, the damages were not restricted to the difference between the contract and market price, but that the plaintiff might recover in respect of the profits which he would have made by a contract of resale into
*453] *which he had entered. The decision is in itself no authority in England, as it turned upon the acknowledged difference between the law of the two countries in this respect. It is remarkable, however, for a vigorous onslaught upon the English law by so formidable an opponent as Lord Cottenham, C. He said,—'If pig-iron had only risen 1*s.* a ton in the market, but the purchasers had lost 1000*l.* upon a contract with a railway Company, in my opinion they ought not only to recover the damage which would have arisen if they had gone into the market and bought the iron at the increased price, but also that profit which would have been received if the party had performed his contract. No other rule is reconcileable with justice, nor with the duty which the jury had to perform,—that of deciding the amount of damage which the party has suffered by the breach of his contract.' But, with the greatest possible respect, it may be suggested that the rule most reconcileable with justice would be, to inquire what was the contract, and what were the liabilities really entered into by the parties. The question is, not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated, and undertook to pay for. It is quite clear that loss of profits by a resale can never be contemplated, unless the resale has actually taken place at the time, and is communicated to the other party. The reason is, that such a profit is utterly incapable of valuation. It may depend upon a change of weather, a scientific discovery, an outbreak of war, a workman's strike. It will depend upon the energy and sagacity of the person who purchases the goods, and the solvency of the person to whom he sells them again. In short, if the Scotch rule were to be carried out to its fair extent, no one
*454] *could contract to sell goods which were not actually in his possession, without charging an additional premium, commensurate to the profits which the vendee might possibly make, and for which he himself would have to pay, if prevented from carrying out his agreement."] The English rule, it is submitted, is that which should be followed here. [ERLE, C. J.—The real question is, whether the plaintiffs are entitled to recover the 159*l.* as damages arising out of the resale of the soda by Heitmann to Heinburger.] In Josling v. Irvine, 6 Hurlst. & N. 512,† the defendant on the 26th of July sold by sample to the plaintiff 3000 gallons of naphtha, at 2*s.* 2*d.* per gallon. On the 27th the plaintiff resold the same to H. (also by sample), at 2*s.* 6*d.* It appeared that the sample contained 73 per cent. of benzol, an article used in the manufacture of Magenta dye, then newly discovered, and for that purpose was worth 5*s.* 9*d.* a gallon. The defendants failed to deliver the naphtha. It was proved that H. had claimed the difference between 5*s.* 9*d.* and 2*s.* 6*d.* from the plaintiff. In assessing the damages in an action for the non-delivery of the naphtha, the jury gave this amount to the plaintiff as damages. The Court directed a new inquiry, because it did not appear at what price the plaintiff could have procured naphtha according to the sample, a

the time of the breach,—Martin, B., saying: "Upon these facts, I think that the case of Randall *v.* Rapir, E. B. & E. 84 (E. C. L. R. vol. 96), is decisive to show that the damage which the plaintiff is liable to pay to the sub-purchaser may be taken into consideration. I agree, that, if a person purchases stock, or any other article which has a certain known price and quality, the market-price at the time of the breach affords a fair measure of damage. But, in this case, the value of the naphtha may have risen immediately after the sale, and there may have been no ascertainable *market value." On a second inquiry, it appeared that naphtha known to contain 73 per cent. [*455 of benzol could not have been bought for less than 5*s.* 9*d.* at the time of the breach. The learned Judge before whom the inquiry was executed told the jury that the plaintiff would have no answer to an action by H. for the difference, and advised the jury to give such a sum as would enable him to pay H. The jury having adopted this view, it was held that the damages were rightly assessed, and that there was no misdirection. In Mayne on Damages, p. 16, it is said: "One very common instance in which damages are held to be too remote, arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out his contract. It is by no means true, however, that such profits can never form a ground of damage. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. When A. agrees to execute work for B., or to sell him goods, or hire him a ship at a future day, the benefit to A. is the profit flowing from the transaction, and to this he is entitled. But, when the thing purchased is a specific article, and not the right to make a profit, the measure of damages will be the value of that article, or the difference between the contract-price and that at which it could have been purchased elsewhere. The mere fact that some ulterior profit might have been made out of it cannot be considered, because such profit formed no part of the contract. This distinction has been very clearly pointed out in a case in the Supreme Court of New York. The plaintiffs had contracted with the defendants to furnish marble from a specified quarry, at a fixed sum, for the erection of a City Hall. The plaintiffs entered into a contract with *the proprietors of [*456 the quarry for the required amount, at a smaller sum. After delivering a part of the marble, the defendants refused to receive any more. The plaintiffs sued for breach of contract, and claimed as damages the profit they would have made by furnishing the marble at a larger sum than they were to pay for it. Kent, J., ruled accordingly, 'that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them:' and this ruling was affirmed in the Court above. Nelson, C. J., said: 'It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be

taken into the estimate. Besides the uncertain and contingent issue of such an operation, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in the expectation of the performance of the principal contract. But, profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself,—entering into and constituting a portion of its very *457] *elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement:' Masterton v. The Mayor, &c., of Brooklyn, 7 Hill's N. Y. Rep. 61. It is conceded that the plaintiffs are entitled to the loss of profit on their sale to Heitmann. Are they not also entitled to recover the sum which they were compelled to pay Heitmann to compensate him for the loss he sustained by the breach of his contract with his vendee? It is difficult to discover any principle upon which these two heads of damage are to be distinguished. When a man sells goods to a merchant, he knows that they are bought for the purpose of resale. In Smeed v. Foord, 1 Ellis & Ellis 602 (E. C. L. R. vol. 102), the defendant contracted to deliver to the plaintiff, a farmer, a threshing-machine, within three weeks. It was the plaintiff's practice, known to the defendant, to thresh wheat in the field, and send it thence direct to market. At the end of the three weeks, the plaintiff's wheat was ready in the field for threshing; and, on the plaintiff's remonstrating at the delay in the delivery of the machine, the defendant several times assured him it should be sent forthwith. The plaintiff, having unsuccessfully tried to hire another machine, was obliged to carry home and stack the wheat, which, while so stacked, was damaged by rain. The machine was afterwards delivered to the plaintiff, who paid the defendant the contract price. The wheat was then threshed; and it was found necessary, owing to its deterioration by the rain, to kiln-dry it. When dried and sent to market, it sold for a less price than it would have fetched had it been threshed at the time *458] fixed by the contract for the *delivery of the machine, and then sold,—the market-price having in the meantime fallen. In an action for the non-delivery of the machine, it was held that the plaintiff was entitled to recover substantial damages in respect of the expense of stacking the wheat, of loss arising from its deterioration by the rain, and of the expense of drying it in the kiln.(a)

Brett, Q. C., and *Littler*, in support of the rule.—There being no

(a) But that he was not entitled to recover any damages in respect of the fall in the market-price of the wheat, inasmuch as that could not have been in the contemplation of the parties when the contract was made, and could not be said to have been in any way the natural result of the defendant's breach of contract.

market to which the plaintiff, could have resorted in order to supply themselves with the article in question, upon the defendant's failure to deliver it pursuant to his contract, it may be that the plaintiffs were entitled to recover as damages the difference between the contract-price and the price which they would have received under their sub-contract with Heitmann; and that sum the defendant has paid into court. All beyond that was clearly too remote. The plaintiffs, however, claim to be entitled also to the increased freight and insurance to which the 26 tons delivered were subjected by reason of the lateness of the season for the Baltic, and also the loss sustained by Heitmann by reason of his inability to perform his contract with his sub-vendee. The true measure of damages, as laid down by all the authorities, is, the loss which the defendant has contracted to make good. The amount of damages payable for a breach is as much part of the contract as the quantity of goods to be delivered or the price to be paid for them. The rule is neatly laid down in Mayne on *Damages, p. 15: "The first, and in fact the only inquiry in all these cases, is, whether the damage complained of is the [*459 natural and reasonable result of the defendant's act: it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act;" that is, the result which might reasonably be expected from the defendant's breach of contract; or, in cases of contract, if it appears to have been contemplated by both parties. Where neither of these elements exists, the damage is said to be too remote." That means, contemplated at the time the contract is made, and with reference to the contract. This case, it is submitted, does not fall within either of those rules. The contract was made with the plaintiffs at Newcastle. It is true that the defendant was told at the time that the soda was wanted for shipment to a correspondent abroad: but no names were disclosed, nor was it stated to what part abroad it was to be sent. What, then, is the natural consequence of the breach of such a contract? Can it be more than the loss of the profit the plaintiffs would have made if they had been enabled to perform their contract with the merchant abroad? Then, upon what principle can the defendant be liable for the increased freight and insurance? There is no pretence for saying that there was anything in the contract from which the plaintiff could reasonably infer that the defendant knew the soda was to be shipped for the Baltic. Vessels are constantly running to Antwerp and Rotterdam from Hull, as well as to Hamburg and the Baltic. Or it might be that the soda was wanted for shipment to a Belgian or a French port. The claim in respect of the sub-contract is altogether out of the question. That is disposed of by the case of Portman *v.* Middleton, 4 C. B. N. S. 322 (E. C. L. R. vol. 93). There, A. contracted with B. to repair a steam *threshing-machine, undertaking to get it ready by harvest-time. A new fire-box being needed, C. [*460 engaged to make one for A. "in about a fortnight," but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere, at an additional cost; but this he did not do in time to enable him to perform his contract with B. (although there was ample time for him to have done so after C. had broken *his* contract); whereupon B. sued A., who paid him 20*l.* to

settle the action. It was held that A. was entitled to recover from C. the sum he had paid for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A. to B. was not such a damage "as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it,"—within the rule in Hadley *v.* Baxendale. 9 Exch. 341.†

ERLE, C. J.—This was an action for the breach of a contract to deliver a quantity of caustic soda. As a general rule, a vendor who fails to deliver goods according to his contract, must pay as damages to the vendee the difference between the value of the goods at the time of the breach of contract as compared with the contract-price: or, in other words, if the vendee can go into the market and get the article contracted for, the vendor must reimburse him the difference between that which he has been compelled to pay for it and the price at which the vendor had contracted to deliver it. But, where the article is not one of constant demand and supply, so that there is no market which can be resorted to for the purpose of obtaining it, another *principle must be had recourse to in order to determine the measure of damages which the vendee is to recover: and that principle has been adopted here, in accordance with the rule in Hadley *v.* Baxendale, 9 Exch. 341,† where it was held, that, where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The vendor is to pay to the vendee such damages as he may fairly and reasonably be supposed to have considered that he would be liable to pay in the event of his failure to perform his contract. Here, the vendor had notice that the vendee was buying the caustic soda,—an article not ordinarily procurable in the market,—for the purpose of resale to a sub-vendee on the continent. He made the contract, therefore, with knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad. If the plaintiffs could have delivered the caustic soda which the defendant failed to supply to their vendee Heitmann, their profit thereon would have been 52*l.* 5*s.* 4*d.* That sum the defendant has paid into Court: and we may assume that the plaintiffs are entitled to recover as damages for the defendant's breach the loss of the profit which the plaintiffs would have derived from the transaction if the defendant had delivered the caustic soda pursuant to his contract.

*461]

Then, the contract was for the sale of 75 tons, 25 tons of which was were to be delivered in June, 25 tons in July, and 25 tons in August. None was delivered *until September; and then only 26 tons in all. The question is, to what damages the defendant is liable by reason of that late delivery. Now, the purchaser of the caustic

*462]

soda from the plaintiffs was a merchant residing in St. Petersburg: and, if the plaintiffs could have had the article at the times stipulated for, viz., in the months of June, July, and August, they could have forwarded it to St. Petersburg at a less charge for freight and insurance than they were compelled to pay. In consequence of the lateness of the season, it cost the plaintiffs 35*l.* 15*s.* additional for freight, and 5*l.* 2*s.* additional for insurance, beyond what they would have had to pay if the soda had been forwarded in time. It was insisted by Mr. *Brett* that notice to the defendant that the plaintiffs were buying the caustic soda for the purpose of fulfilling a contract with a correspondent "on the continent," and that the place of shipment was Hull, was not a notice that the sub-purchaser was a merchant in Russia, and that the destination of the soda was a port in the Baltic; and, therefore, that this loss by the increase of freight and insurance was not one which the plaintiffs could claim as a matter in respect of which the defendants had had notice at the time of the contract. It seems to me that Mr. *Brett* has succeeded in making good that ground. I do not think a notice that the sub-purchaser was a person residing "on the continent," was notice that the goods were for shipment to the Baltic. But the defendant has broken his contract, and the plaintiffs are entitled to damages for that breach. What are those damages? I think they are such as might reasonably be expected to arise from the breach. The goods were to be sent to Hull, where, if duly delivered, they would have been available for the Baltic market. When they were sent, they were not so available for the Baltic market as they would have been if *they had been sent to Hull in accordance with the terms of the contract. I agree that it is not competent to a purchaser so to deal with goods delivered under such circumstances as to exaggerate the loss: but, if he does all that a man of reasonable skill and care can do to make the damage as small as possible, there is no reason why he should not be recouped to that extent. Receiving the soda in September and October, I think the plaintiffs turned it to the best account they could by forwarding it to Heitmann as they did. I do not see how they could have diminished the loss by sending it elsewhere. Having sent it to St. Petersburg at an increased cost of 40*l.* 17*s.*, I think that sum fairly represents the amount of deterioration of the article by reason of the defendant's breach of contract, and that the plaintiffs were entitled to charge the defendant for that deterioration. [*463

The plaintiffs further claimed damages by reason of their having been called upon to reimburse Heitmann, their vendee, to the extent of 159*l.* which Heitmann had paid to Heinburger, a manufacturer to whom he had contracted to sell the soda, to compensate him for the breach of his contract with him. It appears to me that that claim is too remote. The defendant had notice at the time of entering into the contract with the plaintiffs that they had contracted with one purchaser on the continent. For the damages resulting from that, it is agreed that he is responsible. But he had no notice of the subsequent resale: and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of subsales. These could not in any sense be considered as the direct,

natural, or necessary consequence of a breach of the contract he was entering into.

*464] WILLES, J.—I am of the same opinion. As to the *damages claimed in respect of the loss on the contract between Heitmann and Heinburger, it is consistent with all that was or could have been known to the defendant at the time he made his bargain with the plaintiffs, that such a contract might or might not have been entered into. Even supposing the defendant knew that Heitmann was the purchaser from the plaintiffs, and that it was Heitmann's intention to sell the soda again, I see no principle upon which he could be made liable in respect of that. This is a very different case from Randall v. Raper, E. B. & E. 84 (E. C. L. R. vol. 96), where the defendant sold the plaintiffs seed barley with a warranty that it was barley of a particular description. There, the seed was subject to an inherent or latent defect, by reason of which it produced an inferior and insufficient crop: and, whether the damages accrued to the first purchaser or to a sub-purchaser from him, was a matter of comparative indifference; they were equally damages naturally resulting from his breach of contract. But here the purchasers entered into a contract to sell to Heitmann, trusting to the performance of his contract by the defendant, to enable them to perform theirs. The defendant had notice of this contract; and I see no injustice in holding him to be liable to that extent. Heitmann chose to take upon himself a similar risk, and to contract for the sale of the soda to Heinburger. Even if the defendant had notice of this second contract at the time he sold to Heitmann, I think the damages arising from the non-delivery by Heitmann to Heinburger were too remote: he entered into no bargain to be answerable for such consequences. As to the additional cost for freight and insurance incurred in sending the 26 tons to Russia, by reason of the lateness of the period at which they were forwarded to Hull, it seems to me that that was properly recoverable

*465] *as damages which were the direct and natural consequence of the defendant's failure to perform his contract, and upon the simple ground stated by my Lord. It is not suggested that the plaintiffs could have done other than they did to make the soda more valuable. What they did seems to have been the only reasonable thing they could do: and it showed in the result what the real worth of the soda was. In ordinary cases, where the article is one which can be bought in the market, the proper measure of damages for breach of a contract to deliver, is, the difference between the contract-price and the market-price on the day of the breach: and I can quite understand a case arising where goods are bought for the purpose of fulfilling a contract for resale at a price higher than the market-price, and the original seller has notice of that fact: the damages in such a case might well be influenced by that fact. That, however, is not this case: there was no such notice; and there was no market-price to which resort could be had as a test of damage. We must, therefore, ascertain what was the value of the article contracted for at the time it ought to have been, and at the time when it actually was delivered. Now, the value of such an article as this depends upon the existence of facilities for its transport to the place for which

it is destined. If the caustic soda had been forwarded to Hull at the times contracted for, it was capable of being sent to St. Petersburg. When it was delivered, it was also capable of being sent to St. Petersburg, but only at a greater cost for freight and insurance than would have been incurred if it had been delivered in due course at Hull. It necessarily follows, therefore, that the soda was worth less when it was delivered, by the difference between the cost of forwarding it at that time to St. Petersburg and what the cost would have been if delivered at the times *mentioned in the contract. The plaintiffs are clearly entitled to recover that as the direct and natural consequence of the defendant's breach of contract. The rule will, therefore, be made absolute to reduce the verdict by the 159*l.* paid by the plaintiffs to Heitmann for the compensation paid by him to Heinburger for the breach of his contract with him. [*466

KEATING, J.—I also am of opinion that the plaintiffs were entitled to recover as damages for the defendant's breach of contract the increased amount incurred for freight and insurance by reason of the delay in the delivery of the caustic soda contracted for, on the ground already stated by my Lord and my Brother Willes, viz., that the lateness of the delivery occasioned a diminution in the market-value of the article. That is entirely in accordance with the principle upon which this Court acted in the case of Wilson *v.* The Lancashire and Yorkshire Railway Company, 9 C. B. N. S. 632 (E. C. L. R. vol. 99). That arose out of a contract of carriage. The goods, which consisted of cloth, had been purchased by the plaintiff, a cap-manufacturer, for the purpose of being made up into caps: but, in order to use the cloth to the best advantage, it was necessary that he should have it in time to make it into caps by a certain season. The delay in its transmission by the defendants caused the loss of the season. This Court held that the loss of the season might under the circumstances fairly be considered as a deterioration or diminution of the market-value of the cloth. That is identical in principle with this case. I also entirely agree with the rest of the Court that the further damage claimed, viz., the sum paid by Heitmann to compensate Heinburger for the loss of his sub-contract with Heitmann, was too remote, and cannot be recovered by the plaintiffs in this action.

Rule absolute accordingly.

The measure of damages, in cases where a contract for the sale of chattels has been broken by the vendor's non-delivery of the commodity bargained for, seems to be similar in the United States and England, and to be the Roman rule with slight modification, which, under the form that it received from Pothier (Poth. on Obl. 159, 160), was introduced into the Code Napoléon, §§ 1149, 1150, 1151, and from this, with but partial change, copied into the Code of Louisiana, Art. 1928, 9 La. Ann. 273. At the common law, damages in contract is a pecuniary compensation for an actual *pecuniary* loss (10 Casey 9), and the latter is the measure of the former: Broom on Com. L. [629], [634], 2 H. 96, 23 How. 166, 5 Bosw. 625. By the civil law, as in California (17 Cal. 487), and Louisiana (3 La. Ann. 105), fraud in such cases was punishable: besides, the limit of damages was the two-fold value, except when crime was involved. The law, which is but the expression

of common custom and experience, presumes, that in the affairs of life, every man takes into consideration the *natural* consequences of his acts; *i. e.*, as they will probably arise according to the usual course of events (this fulfils the conditions of legality, proximity of time and directness of relation between the non-performance and loss expressed by *modo circa* or *propter ipsam rem* (Poth. Cont., de Vente 1, 70), "direct," "immediate," "*immediately out of the contract*" (10 Casey 9), "proximate," "necessary," "certain," "legal," and excludes interference by the injured person to cause or increase the damage: See 1 Strobh. 389, 525. He must diminish his damage, if he can: 7 Greenl. 51; 16 Wisc. 581; 28 Ill. 457; 13 Maryl. 314; 17 Id. 419; 1 Tiff. 72). All contracting parties may be said therefore, to contemplate, when they bargain, the possibility of non-performance; and to agree upon the amount to be paid in that contingency, either expressly, in liquidated damages (2 Greenl. Ev., § 257; Tidd's Pract. 176 n. (*o*), 876 n. (A)), or, impliedly, the amount of probable actual loss, *i. e.*, by expenditure or depreciation of that which is possessed, or deprivation of gains or profits as a *natural* (as above) result (in case of sale) of the non-delivery of the thing *propter rem non habitam*. If this have a market price or value, and be usually easy of purchase, such value at the time of delivery, deducting the contract price, is the measure: 2 Kent's Com. 625; 12 Wright 407; 26 N. Y. 309; 19 Conn. 212; 4 Texas 289; 33 Mo. 150; 13 Gray 429; 23 Ind. 1; 8 Minn. 346; 11 Mich. 542. If no time for delivery be appointed, then that of refusal will be chosen; 16 Maryl. 222; Bald. 331; or of commencing suit, 1 Bay 105; or on notice, 23 Pick. 400; 3 Cr. 298; or a reasonable time, 3 Sandf. 585; 8 Minn. 346. When no market is held at the place and time of delivery, the nearest market furnishes the standard: 30 Maine 491; or the market to which the like article is usually sent from the place of delivery: 7 N. H. 360. (The object of the rule is to give the injured party such compensation as will enable him to obtain the article: 30 Maine 491. An exception to this rule exists in some of the states where the consideration is prepaid, and in the case of stocks, 2 Greenl. on Ev., § 260, 26 N. Y. 309, 16 Conn. 212, 23 Ind. 1, founded on the ground that the vendee having been deprived of his money, is entitled to the profit he might have made—the difference between the contract price and the highest market value between the times of breach and trial: 2 Kent's Com. 624; 1 Swift's Dig. 738; 31 N. Y. 676; 19 Conn. 212. A doctrine disapproved of by Chanc. Kent, *sup.*, and C. J. Gibson, 2 Harris 96. See also 3 Sanf. 637.) When no mode of ascertaining the value is found, the contract price will be resorted to: 4 Cal. 392. If the article have no market value, be not easy of purchase, and the vendee have in view a purposed use for it, of which the vendor had express or implied notice when the agreement was made, the supply of the article for that use becomes a condition of the contract, and the loss to the vendee by its non-fulfilment is by the contract no longer extrinsic or remote.

The loss under these circumstances, as no market value can be found as a standard, is the vendee's loss by expenses, and by failing to get the profits which he must have gained had his purpose been accomplished: 2 Kent, *sup.*; 3 Pars. on Cont. 178, *et seq.*; Poth. on Obl., *sup.*, Contr., de Vente 71; Troplong de la Vente 300; Sedgwick on Dam. 210; 20 Law Rep. 49; 10 Casey 9; 12 Wright 309, 407; 25 Ill. 86; 13 Mo. 517; 23 How.

166; 9 La. Am. 273, 294; 4 Mart. N. S. 246; 1 Tiff. 76; 13 Maryl. 314; 2 Sm. Lead. Cas. 536; 11 Jur. N. S. 973. The above measure of damages is applied to cases of breach of contract by a common carrier: Angell on Carr. 460; Kent's Com., *sup.*; 14 Gray 165; 2 Head. 488; 29 Barb. 633; 45 Id. 502; 12 Casey 360 (but see Mayne on Dam. 17, contra).

The current of authority seems to be in favour of allowing profits as an element of loss under the above condition: 3 Pars., *sup.*; 13 Maryl. 314; excluding therefrom those remote and speculative, or merely conjectural, without any past sales or values by which to compute them: 1 Allen 331; 12 Cush. 366; or out of illegal business, 9 Bosw. 154, or void contract, 5 La. N. S. 131; 25 Ga. 390; or a fancied good bargain, or sub-contract *not made known when the bargain is made to both parties*, Kent, *sup.*, Sedgwick on Dam. 76 (3), although some of our Courts have refused to award profits, as such, on the ground of the difficulty in ascertaining them. 21 Wend. 342, is a much cited case, declared in 2 Sm. N. Y. 489, to be only understood on the ground that the profits there denied (from steamer) were incapable of computation, and were like those arising from a foreign voyage. The latter were refused mainly because the state of a foreign market cannot be correctly determined: 1 Gall. 320; 3 Wheat. 346; 5 Id. 385; contra, 13 How. 112; 2 Wall. U. S. 538; 3 Id. 305; cases of collision or unlawful seizure, 1 Conkl. Adm., 2 Prich. Adm. Dig.; 4 Harris 228, 315; 1 Pars. on Mar. Law 205–6.

Profits are, however, allowed, when the market value of the foreign port of destination, is the measure of damages against a carrier, although this objection was taken 2 Caines 221, and the home port declared to furnish the standard of value, as the market value at foreign ports was too doubtful.

Profits are insurable, and the loss of them can be easily proved: 2 Pars. on Mar. Law 70. They are allowed in suits for infringement of patent rights: 16 How. 480; 20 Id. 103; for land in some cases; 31 Ill. 478; and on breach of contract to sell or carry articles having a market value; and the deprivation of them was regarded by the civil law as an equally important element of loss as expenses, *quantum mihi abest, quantumque lucrari potui.*

Profits that represent the *real value of a bargain*, or the inducement to enter into it, such as the difference of cost to a contractor and the contract price he is to receive for the erection of a building or making a machine, are allowable, and the like; 37 Verm. 239; 12 Ohio 360; 1 Cas. 382; 6 Wright 485 (but see 12 Id. 309); Sedg. on Dam. 76 (3), *et seq.*; 11 Mich. 542 (an important case); 2 Sm. N. Y. 489; 6 Cal. 19; 6 Barb. 419; 3 La. Ann. 44; 6 M'Lean 612; 13 How. 309; 3 Cush. 200; 7 Hill 61; 103 E. C. L. R. 142. It is thought that the contractor who has agreed to build a house or vessel, or make a machine, or to repair any of these by a given time, should, on default, be presumed naturally to have foreseen the loss of profits, *i. e.*, of the market value in their use—the rent, freight, or hire they would have produced if completed. Of such damages past income or yield is evidence, as in partnership cases: 6 Seld. 489; and cases of injury by negligence, preventing pursuit of profession or employment: 2 Black 290; 20 How. 34; 23 Wend. 434; (see also 36 Ala. 61); or if cognizant of their peculiar value—the special need for the article, *e. g.*, repairs to an oil-mill, the business of which is interrupted on that account, the defaulting contractor will be liable for any profits thus lost. The law does not seem, however, to be settled on these points.

*467] *SEMENZA and Others v. BRINSLEY and Another.

Feb. 27.

1. One who buys goods of a person whom he knows to be selling them as an agent, cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know and had not the means of knowing who was the real owner.

2. To an action for goods sold and delivered, the defendants pleaded, that the goods were sold to them by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods with the consent of the plaintiffs; that the defendants at the time of the sale and delivery did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was their agent; and that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became and continued indebted to the defendants for goods sold, &c., to an equal amount, which they were willing and offered to set off:—

Held, a bad plea, for not averring that the defendants did not know and had not the means of knowing that Moll at the time he sold the goods to them was a mere agent.

THE third count of the declaration was for money payable by the defendants to the plaintiffs for goods bargained and sold by the plaintiffs to the defendants, and for goods sold and delivered by the plaintiffs to the defendants, and for money received by the defendants for the use of the plaintiffs, and for interest payable by the defendants to the plaintiffs upon money due from the defendants to the plaintiffs and forborne at interest by the plaintiffs to the defendants at their request, and for moneys found to be due from the defendants to the plaintiffs on accounts stated between them: and the plaintiffs claimed a return of the goods mentioned in the first count, or their value, and 500*l.* for their detention, and also 500*l.* in respect of the matters mentioned in the other counts of the declaration.

The defendants pleaded, amongst other pleas, sixthly, to the third count, so far as it related to the said money payable for the said goods sold and delivered, that the said goods were sold and delivered to the defendants by one John Peter Moll, then being the agent of the plaintiffs in that behalf, and intrusted by the plaintiffs with the possession of the said goods as apparent owner thereof, and the said John Peter Moll, having possession of the said goods as aforesaid, sold and delivered the same to the defendants in his own name and as
*468] his own goods, with the consent of the *plaintiffs; that, at the time of the said sale and delivery of the said goods, the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the said goods or were interested therein or in the said sale thereof, or that the said John Peter Moll was the agent of the plaintiffs in that behalf; and that, at the time of the said sale and delivery of the said goods, and before the defendants knew that the plaintiffs were the owners of the said goods or any of them, or interested therein, or that the said John Peter Moll was the agent of the plaintiffs in the sale thereof, the said John Peter Moll became, and was at the commencement of this suit, and still was, indebted to the defendants in an amount equal to the plaintiffs' claim, for money payable by the said John Peter Moll to the defendants, for goods sold and delivered by the defendants to the said John Peter Moll, and for money found to be due from the said John Peter Moll to the defend-

ants on accounts stated between them,—which amount the defendants were willing to set off against the plaintiffs' claim.

The plaintiffs demurred to this plea, the ground of demurrer stated in the margin being, "that the plea does not allege that the defendants did not know or had not the means of knowing that Moll was *merely an agent*, but only that they did not know and had not the means of knowing that Moll was *agent for the plaintiffs;* and it is consistent with such plea, that they knew and [or?] had the means of knowing that Moll was a mere agent." Joinder.

Sir George Honyman, in support of the demurrer.—The sixth plea is objectionable upon two grounds,—first, for not alleging that the defendants did not at the time of the sale know that Moll was a mere agent,—secondly, for not alleging that at the time when the [*469 *debt as between Moll and the defendants was contracted, the defendants did not know that he was a mere agent. All that the plea states, is, that the goods were sold to the defendants by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods with the consent of the plaintiffs; that the defendants at the time of the sale and delivery did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was *their* agent; and that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became and continued indebted to the defendants, &c. Where a man buys of one who he knows or has the means of knowing is selling as agent for somebody else, he cannot in an action by the principal for the price set off a debt due to him from the agent, though he did not at the time he bought the goods know *who* the principal was. It is perfectly consistent with all that is alleged in this plea, that, at the time of the sale and of the indebtedness, the defendants knew that Moll was selling as agent. [WILLES, J.—The allegation is, that the goods were sold by Moll in his own name and as his own goods, with the consent of the plaintiffs.] It is not averred that the defendants bought them from Moll as his own goods, or that they did not know he was selling as agent for some unknown principal. This is the turning point, as is put by the Court in Purchell *v.* Salter, 1 Q. B. 197 (E. C. L. R. vol. 41), 1 Gale & D. 682. [WILLIAMS, J.—Have not the defendants a right to say that they were justified in giving credit to the character which Moll with the plaintiffs' consent assumed?] Clearly not: if before Moll became indebted to them, *the defendants became [*470 aware that Moll was selling the goods as agent, they have no right of set-off. In the notes to George *v.* Clagett (7 T. R. 359), in 2 Smith's Leading Cases, 5th edit. 108,—observing upon a passage in the judgment of the Court of Queen's Bench in Sims *v.* Bond, 5 B. & Ad. 389, 393 (E. C. L. R. vol. 27), "It is a well-established rule of law, that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party,"

—the learned editors say: "However, the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and, though he may not be expressly told, still must be supposed to have known, that he was dealing, not with a principal, but with an agent, the reason of the above rule ceases, and then, cessante ratione, cessat lex. Thus, in Baring *v.* Corrie, 2 B. & Ald. 137, Coles & Co., who were brokers and also merchants, sold to Corrie & Co. in their own names sugars belonging to Baring & Co., who brought an action for the price. The true nature of the contract was entered by Coles & Co. in their broker's book, which the defendants might if they pleased have seen: nor had Coles & Co. the possession of the sugars, which were lying in the West India Docks, whence by the usage of the docks they could not have been taken without the order of the plaintiffs, whose principal clerk signed the delivery order. Under these circumstances, the Court held that the defendants had no right to set off against the plaintiffs' demand for the price of the goods a debt due to them from Coles & Co. 'It is to be *471] *observed,' said Bayley, J., 'that the plaintiffs did not trust the brokers with either the muniments of title or the possession of the goods, as was done in both the cases of Rabone *v.* Williams, 7 T. R. 360 (*a*), and George *v.* Clagett, 7 T. R. 359. There is another circumstance by which the defendants might easily have ascertained whether Coles & Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that, if the defendants had asked to see the book, they would instantly have discovered whether Coles & Co. acted as brokers or not. I therefore think that the plaintiffs did not by their conduct enable Coles & Co. to hold themselves out as the proprietors of these goods, so as to impose on the defendants; that the defendants were not imposed on; and, even supposing that they were, they must have been guilty of gross negligence. I cannot think that the defendants believed when they bought the goods that Coles & Co. sold them on their own account; and, if not, they can have no defence to this action.'" And, after referring to Maanss *v.* Henderson, 1 East 335, and Moore *v.* Clementson, 2 Campb. 22, the learned editors go on,—"In the case of Warner *v.* M'Kay, 1 M. & W. 591,† it was held that a purchaser might set off payments made to a factor, if he believed that the factor had a right to sell, and did sell, to repay himself advances: but see the observations on this case in the judgment in Smart *v.* Sandars, 3 C. B. 399 (E. C. L. R. vol. 54), and per Cresswell, J., in Fish *v.* Kempton, 7 C. B. 694, where it was held that knowledge by the purchaser of goods that the vendor sold them as factor, disentitled him to set off a debt due by such factor in an action by the principal. The set-off, however, to be available, need not exist *at the time of the sale:* if it arises before notice of the real ownership, it *472] is sufficient." Here, *the defendants do not say that they bought the goods as the goods of Moll, or supposing him to be the owner of them. [KEATING, J.—The pleader has followed the precedent in Bullen & Leake, 2d edit. 580.] But not that given in 3 Ch. Pl. 122 123, and in Purchell *v.* Salter and Carr *v.* Hinchliff,

4 B. & C. 551 (E. C. L. R. vol. 10), 7 D. & R. 42 (E. C. L. R. vol. 16). In Maanss *v.* Henderson, an English subject, in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker *in his own name*, but informing him at the same time that the property was *neutral:* and it was held that this was a sufficient indication to the broker that the party acted as *agent*, and not on his own account, and therefore that the broker had no lien on the policy so effected for his general balance against such agent, as between such broker and the principal. In Moore *v.* Clementson, Lord Ellenborough said: "A man who is in the habit of selling the goods of others may likewise sell goods of his own: and, where he sells goods as a principal, with the sanction of the real owner, the purchaser who is thus led to give him credit shall on no account afterwards be deprived of his set-off by the intervention of any third person. But here there was express notice to the purchaser before the contract was completed, that Green in this particular transaction acted only as a factor." That is the true rule. The mere knowledge that the seller is a factor or agent does not deprive the buyer of his right of set-off: but, if he knows at the time of the purchase that the seller is acting as a factor in the particular transaction, the right to set-off does not attach. [ERLE, C. J.—Does not the plea come up to the doctrine laid down in George *v.* Clagett?] Not if the defendants were aware (and it is consistent with all that is alleged in this plea that they were aware), at the time they bought the goods of Moll, that he was really selling them as agent of a third person.

* *Watkin Williams*, contrà.—The two points suggested do not properly arise. The plea alleges a sale and delivery of the [*473 goods to the defendants by Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that, Moll having possession of the goods, sold and delivered them to the defendants in his own name and as his own goods, with the consent of the plaintiffs; that, at the time of the said sale and discovery, the defendants did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or were interested therein or in the sale thereof, or that Moll was the agent of the plaintiffs; and that, *at the time of the said sale and delivery of the goods*, and before the defendants knew that the plaintiffs were the owners of them, or that Moll was the plaintiffs' agent, the set-off accrued. The difficulty arises entirely from the use of superfluous words. [ERLE, C. J., suggested that the plea should be amended, by eliminating the allegation that the two sales were contemporaneous (a thing to the last degree improbable), and the allegation that the defendants did not know that Moll was agent *to the plaintiffs;* or that the parties should go down to trial on the pleadings as they stood, the question of costs being reserved. But this was not assented to.] The only question is, whether the defendants had a right of set-off at the time of the sale. George *v.* Clagett, and the notes thereto in 2 Smith's Leading Cases 108, lays it down broadly, that if the owner of goods accredits an agent, and puts it in his power to sell the goods as his own, one who purchases them from him without knowledge of the agency, is entitled to set off a debt due to him from the agent. [ERLE, C. J.—

Believing him to be the owner.] It is not so stated. In all the cases whatever was the language used by the Court, the defendant [*474 knew, or had *the means of knowing, that the plaintiff was the principal. In Fish v. Kempton, 7 C. B. 687 (E. C. L. R. vol. 62), Wilde, C. J., says: "Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different, where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case, there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal. This I consider to be clear and settled law: and I think we are bound not to exhibit any doubt where none should exist, by granting a rule." And Cresswell, J., says: "If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal." Lord Mansfield so lays down the rule distinctly in Rabone v. Williams. "Where," he says, "a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled. The distinction between a factor and a broker is noticed by Abbott, C. J., and *Bay- *475] ley, J., in Baring v. Corrie, 2 B. & Ald. 137. Abbott, C. J., says: "The distinction between a broker and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal: the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited, the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not; and, at all events, they knew that he had a right to sell the goods." The decision of this Court in Norwood v. Dresser, 14 C. B. N. S. 574 (E. C. L. R. vol. 108), as far as it goes, is in favour of the present defence. The Exchequer Chamber, in overruling that decision (see 17 C. B., N. S. 466 (E. C. L. R. vol. 112), held that the knowledge of Dresser's agent was the knowledge of Dresser himself, though acquired long before he became such agent. The substance of this plea is, that the goods in question were sold by Moll as the owner and bought by

the defendants in the belief, induced by the plaintiffs' conduct, that he was the owner; and that brings the case within the rule in Carr *v.* Hinchliff, 4 B. & C. 551 (E. C. L. R. vol. 10), 7 D. & R. 42 (E. C. L. R. 16).

Sir G. Honyman, in reply, was stopped by the Court.

WILLES, J., now delivered the judgment of the Court:—

*This was an action for goods sold and delivered. The sixth plea, the validity of which is in question, alleged a set-off against one Moll, who is stated to have been the factor or agent of the plaintiffs. To that plea the defendants demurred, on the ground that it did not allege that the defendants did not know or had not the means of knowing that Moll was merely an agent, but only that they did not know, and had not the means of knowing, that he was agent *for the plaintiffs;* and the plaintiffs joined in demurrer. [*476

The case was argued in the course of the last term, before the Lord Chief Justice, my Brother Keating, and myself; and the Court took time to consider.

The question is whether the plea sufficiently identifies Moll with the plaintiffs, so as to show that a set-off against him is available in an action brought by them. It was attempted to sustain it by a reference to a series of authorities, beginning with the case of George *v.* Clagett, 7 T. R. 359, commented upon in 2 Smith's Leading Cases, 5th edit. 359. The plea alleges that Moll was intrusted by the plaintiffs with the possession of the goods as apparent owner thereof, and, so having possession of them, sold them to the defendants in his own name and as his own goods, with the consent of the plaintiffs: it then goes on to allege that, at the time of the said sale and delivery of the goods, the defendants did not know, and had not the means of knowing, that the plaintiffs were the owners of the goods, or were interested therein, or in the said sale thereof, or that Moll was the agent of the plaintiffs, and that at the time of the sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or interested therein, or that Moll was their agent in the sale thereof, Moll became and continued indebted to the defendants in the amount which they seek to set off.

*It is necessary to consider whether the averments in this plea satisfy the conditions under which a set-off of a debt due from a factor against a claim for the price of the goods by his principal is allowed. The rule of law upon this subject is well stated in the marginal note to the case of George *v.* Clagett, viz., that, if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal. One may observe, as has often been suggested, and as was very clearly pointed out by Holroyd, J., in Carr *v.* Hinchliff, 4 B. & C. 547 (E. C. L. R. vol. 10), 6 D. & R. 42 (E. C. L. R. vol. 16), that the difficulty was, not in setting up as a defence against the principal that which would be a defence against the factor, by way of extinguishment of the claim of the former, but in applying the statute of set-off, and saying that the terms of that statute were satisfied, so as to say that the debt of the factor should for the purpose of the action be considered as the debt of the principal. That difficulty, however, was [*477

got over, and the factor and the principal were identified by that decision, for the purpose of the statute; and it was held that the existence of the set-off, without any knowledge of the agency, entitled the debtor to set up as against the principal the defence of set-off as a quasi extinguishment, notwithstanding the words of the statute of set-off.

In order to make a valid defence within the rule above stated, it is obvious that the plea should show that the contract was made by a person whom the plaintiff had intrusted with the possession of the goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that the defendant dealt with him as and believed him to be the principal in the transac-
*478] tion, and that *before the defendant was undeceived in that respect, the set-off accrued.

Upon the true construction of this plea, taking all the averments together, it is quite consistent that the seller, Moll, was a factor, and sold the goods in his own name, as is usual with factors, and yet that the defendants may have bought the goods, well knowing that Moll was not the owner, but that he had a principal, though they did not know who that principal was. This would satisfy all the averments in the plea. Indeed, the plea studiously avoids averring that which is the gist of a defence of this sort, viz., that the defendant knew nothing of any principal. We think that the principle laid down in George *v.* Clagett cannot be extended to such a case as this, where the buyer is dealing with a known agent, though he does not at the time know who the particular principal is.

We regret that we are obliged to decide this case upon the construction of the plea. But Mr. *Williams* declined to accede to the suggestion of the Court that he should amend his plea, and Sir *George Honyman* has not applied to strike it out as being embarrassing. Under these circumstances, therefore, we are bound to put the best construction we can upon it; and, for the reasons above stated, we hold that it does not amount to a defence.

The plaintiffs will do well to have the facts specially found at the trial; so that, if it should be thought that we have put too rigid a construction upon the plea, it may be set right in a Court of error.

Judgment for the plaintiffs.

---

*479] *SWIRE *v.* LEACH. *Jan.* 29.

1. Goods deposited with a pawnbroker in the way of his trade, are privileged from distress; and this though they may have been pledged more than twelve months.

2. And, held, that the proper measure of damages was, the value of *the goods*, and not merely that of the plaintiff's interest therein.

THIS was an action of trover for goods which had been deposited with the plaintiff in the way of his trade of a pawnbroker. The declaration alleged for special damage, injury to the plaintiff's trade, &c. Plea, not guilty by statute, the statute referred to in the margin being the 11 G. 2, c. 19, s. 21.

The cause was tried before Pigott, B., at the last Assizes at Liverpool. It appeared that the plaintiff carried on the business of a pawnbroker at Manchester; and that, under a warrant of distress for rent in arrear, the defendant as broker seized amongst other things a quantity of unredeemed pledges, which it was contended on the part of the plaintiff were privileged from distress. There was conflicting evidence as to the value of the articles so seized and so alleged to be protected, but, according to the evidence of the plaintiff's witnesses, they were worth between 30*l.* and 35*l.*

On the part of the defendant it was insisted that unredeemed pledges in the hands of a pawnbroker are not privileged,—the protection only applying where the goods are in the hands of a person who has something to do to them in the way of his trade: and, as to the measure of damages, it was submitted that the plaintiff, at all events, was not entitled to recover the value of the goods themselves, but only the value of his interest in them: and, further, that, assuming that the privilege existed, it was inapplicable to those goods which had been in pledge for more than twelve months, these being by the provisions of the Pawnbrokers Act, 39 & 40 G. 3, c. 99, s. 17, forfeited: Walter *v.* Smith, 5 B. & Ald. 439 (E. C. L. R. vol. 7), 1 D. & R. 1 (E. C. L. R. vol. 16).

The learned Judge overruled the objection: and he *directed the jury to find for the plaintiff for the value of the goods so [*480 seized, distinguishing between those which had been pledged more and those which had been pledged less than a year.

The jury accordingly returned a verdict for the plaintiff, damages 30*l.*, subject to a motion to enter a nonsuit, or to reduce the damages.

Monk, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiff to show cause why a verdict should not be entered for the defendant, or a nonsuit; or for a new trial, on the ground that the learned Judge misdirected the jury in holding that the plaintiff's goods were exempted from distress for rent; or why the damages should not be reduced to such sum as the Court should direct.

W. Sandars and *Holker* now showed cause.—The goods in question are clearly privileged from distress, according to the second rule stated in the notes to Simpson *v.* Hartopp (Willes 512), in 1 Smith's Leading Cases 368, 373.—as being "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." In Adams *v.* Grane, 1 C. & M. 380, 387,† 3 Tyrwh. 326,—where goods sent to the premises of an auctioneer for sale were held to be privileged,—Bayley, J., in giving judgment, says: "The privilege in question has been established for a very considerable period of time. Lord Coke (Co. Litt. 47 a) treats of it as being well known, and the principle of exemption, according to him, is, that it is for the benefit of trade. Among other instances put by him is the instance of 'goods going to a fair or market.' Now, why should they be privileged? They are privileged because interest reipublicæ that buyer and seller should *be [*481 brought together, that a man should have an opportunity of going to some particular place to which goods might be brought for the purpose of sale; and therefore it is one of the old established principles, that goods on their way to a fair, or on their way to a

market, shall be privileged, for the benefit which results to the public from there being a settled place at which the articles may be bought. It is highly beneficial to the manufacturers of goods, to the handy-craftmen, and to many others, who are encouraged to make goods at their own premises by the facility in disposing of them. Where will they be likely to dispose of them? Why, at those places to which purchasers will from time to time resort. They will resort to a fair or to a market; and therefore the privilege and the exemption from distress at that place is of great importance to the person who is the proprietor or the original manufacturer of the goods. The privilege has from time to time been extended according to new modes of dealing established between parties; and one of the modern modes is the case of a factor: and I should observe what is said by Mr. Justice Blackstone in his Commentaries (Vol. 3, p. 8), that there is no hardship in the privilege which is allowed to exist in these cases, because the privilege generally arises to goods which no one could suppose to be the property of the individual from whom the rent was due. The rent is due in respect of premises for the hiring of which the person who acts in that place is the person amenable for the rent; and, if you were to seize the goods of a third person, you would enforce payment, not from the man who had contracted to pay, but from a perfect stranger; and in reality you would be taking the goods of one man to pay the debt of another. The case of a factor is a case strongly analogous to the case in question: and the two cases which have been mentioned, *of Thompson v. Mashiter, 8 J. B. Moore 254 (E. C. L. R. vol. 17), 1 Bingh. 283 (E. C. L. R. vol. 8), and Gilman v. Elton, 3 Brod. & B. 75 (E. C. L. R. vol. 7), 6 J. B. Moore 243 (E. C. L. R. vol. 17), establish the position, that, in the case of a factor, the goods of the principal on the premises of the factor are exempted from distress for rent issuing out of the premises in which the goods are deposited, and yet those goods are, generally speaking, deposited for a much greater period of time than goods at an auction-room. But, why are they protected? Why, interest reipublicæ that the goods of the principal should find their way to a place where there will be a resort for sale: and, if you have goods in the hands of a factor, you will be more likely to sell those goods, because the factor's premises will be a place of resort for those very persons who have occasion for goods in which that factor deals." And Vaughan, B., says: "In the case of Gisbourn v. Hurst, 1 Salk. 249, the rule was laid down with a great deal of correctness, and it has been acted on in all the Courts in Westminster Hall whenever this question has arisen. The rule as laid down in that case, and adopted afterwards in Gilman v. Elton, 6 J. B. Moore 243, 3 Brod. & B. 75, and all the subsequent cases, is, that, wherever goods were delivered to a person carrying on a public trade or employment, to be carried, wrought, or managed in the way of trade, they should be privileged. It does not appear to me that those words are to be scanned with any critical nicety. I should be disposed, certainly, rather to enlarge than to narrow or cripple in any manner the construction of the words 'carried, wrought, or managed in the way of trade or employment.'" Blackstone says,—3 Comm. 8,—"Goods delivered to a man to be used by him in the way of trade shall not be liable

*482]

to distress. As, a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent *to a mill or a market. For, all these are protected and privileged, for the benefit of trade, and are supposed in common [*483 presumption not to belong to the owner of the house, but to his customers." This is adopted from Gilbert on Distresses 35. The right of the landlord to distrain for rent in arrear is an exception on the common law of England: and that right is properly limited where it interferes with the interest of the public,—where the goods must be well known not to belong to the tenant, but to be intrusted to him in the way of his trade. That is the foundation upon which all the cases rest. In Gibson *v.* Ireson, 3 Q. B. 39 (E. C. L. R. vol. 43), materials in the house of a manufacturer for the purpose of his trade, were held not to be distrainable. "The principle of the exemption," says Parke, B., in Muspratt *v.* Gregory, 1 M. & W. 633,† Tyrwh. & G. 1036,(*a*) "is, the public good; that is, that all men may freely and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately, or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me, that, in order to give it full effect, we ought to hold that not merely chattels are privileged from distress which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt which are necessarily placed there, and whilst they are there, in order to enable their owner to enjoy the full benefit of the trade or business as it is there carried on. It is not, I think, because the chattels are to be worked upon the lands so chargeable (though that is the most familiar case), but because they are necessarily placed *on those lands, that the privilege is allowed by the law: and, [*484 if the goods are necessarily placed there, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them. I may also observe, with reference to one part of this proposition, that there appears to be no dispute but that the word 'public' is to be understood to refer to every trade or employ carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals; although it be not 'public' in the sense that all the King's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not,—a predicament which is peculiar at this day to an innkeeper, or perhaps a carrier also; though Lord Holt, in 12 Mod. 484, considered it to belong to all other trades which a man professed to carry on for all persons indiscriminately." And, after an elaborate review of the authorities, the learned Baron concludes,—"I think, for the reasons above given, it [the exemption] applies to every case in which a chattel is necessarily brought on the premises of the trader, in order to enable the owner to enjoy the benefit of the trade." Patteson, J., in Gibson *v.* Ireson, says: "I do not know what is meant by the phrase 'public trade.' It is said in Simpson *v.* Hartopp, Willes 515, that 'materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake

(*a*) Affirmed on error in the Exchequer Chamber, Muspratt *v.* Gregory, 3 M. & W. 677.†

of trade and commerce:' but the trade of a tailor is not public, any more than that of a silk-weaver. If he were obliged, as a carrier is, to receive whatever is sent to him, the case might be different: but he is under no such obligation." In Muspratt *v.* Gregory, the barge was on the premises for the convenience of the owner, and not for the purpose of trade and commerce. So of the brewer's casks sent to the
*485] *publican's premises with beer: Joule *v.* Jackson, 7 M. & W. 450.† The rule is thus stated in the notes to Poole *v.* Longuevill, 2 Wms. Saund. 290 *a*, n. (*q*): "The exemption from distress appears to be an accessory to the privilege allowed by the law to cattle or other goods going to, or at, fairs and markets, for affording encouragement and protection to persons frequenting them. But it has been held that this privilege does not extend to mere customers resorting to the shop, warehouse, or manufactory of individuals: and, accordingly, in a case where salt was manufactured and publicly sold at certain salt-works, and carried away in boats of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation, it was held that the boat of an alkali manufacturer, which was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purpose of his manufacture, was not privileged from distress: Muspratt *v.* Gregory, 1 M. & W. 633,† Parke, B., dissentiente: affirmed in Cam. Scacc., 3 M. & W. 677.† In this case the boat had been left by the owner for his own convenience in the place where it was distrained, and it was not brought or left there for the purpose of being taken care of, managed, or in any way dealt with by the tenant of the land: and therefore the case was held not to fall within the privilege from distress established in favour of things delivered to a person exercising a public trade, to be carried, wrought, or managed, in the way of his trade or business, as in the instances put in the older books, of a horse standing in a smith's shop to be shoed, or in a common inn, or cloth at a tailor's shop, or corn sent to a mill or market (3 Bl. Comm. 8); which privilege has been extended by modern authorities to the cases of goods delivered to factors,—Gilman
*486] *v.* Elton, 3 B. & B. *75 (E. C. L. R. vol. 7), 6 J. B. Moore 243 (E. C. L. R. vol. 17); and wharfingers,—Thompson *v.* Mashiter, 1 Bingh. 283 (E. C. L. R. vol. 8), 8 J. B. Moore 254 (E. C. L. R vol. 17), Matthias *v.* Mesnard, 2 C. & P. 353 (E. C. L. R. vol. 12); auctioneers,—Adams *v.* Grane, 1 C. & M. 380,† 3 Tyrw. 326; and, lastly, carcase-butchers,—Brown *v.* Shevill, 2 Ad. & E. 138 (E. C. L. R. vol. 29), 4 N. & M. 277 (E. C. L. R. vol. 30); but has not been allowed to carriages standing at livery,—Francis *v.* Wyatt, 3 Burr. 1498; nor to stocking-frames sent with materials to a weaver (though the materials themselves would be privileged),—Wood *v.* Clarke, 1 C. & J. 484,† 1 Tyrwh. 314; nor to a threshing-machine let to the tenant,—Fenton *v.* Logan, 9 Bingh. 676 (E. C. L. R. vol. 23), 3 M. & Scott 82 (E. C. L. R. vol. 30); nor to brewers' casks sent to a public-house with beer, and left there till the beer is consumed,—Joule *v.* Jackson, 7 M. & W. 450."† In Findon *v.* M'Laren, 6 Q. B. 891 (E. C. L. R. vol. 51), goods in the hands of a commission agent for sale in the way of his business, were held exempt from distress. In Brown *v.* Arundell, 10 C. B. 54 (E. C. L. R. vol. 70), goods sent to an auctioneer for sale on premises

occupied by him, were held to be privileged from distress for rent, although the place of sale was merely hired for the occasion,—or even where the occupation had been acquired by the auctioneer by an act of trespass. The like was held in Williams *v.* Holmes, 8 Exch. 861.†

The proper measure of damages, where goods have been taken by a wrongdoer out of the hands of a bailee, is, their value. [ERLE, C. J.—The plaintiff would be liable over to that extent to the true owner.] There is no substantial distinction in this respect between pledges which were forfeited by lapse of time and those which were not. Until sold, the property in the pledge continues in the pawnor, notwithstanding the lapse of twelve months. In Walter *v.* Smith, 5 B. & Ald. 439 (E. C. L. R. vol. 7), 1 D. & R. 1 (E. C. L. R. vol. 16), it was expressly held that a pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods *were pledged, if the original [?] owner tender him the principal and interest due. The mode of conducting the sale is [*487 regulated by the 39 & 40 G. 3, c. 99, ss. 17, 18, 20; but the *property* is unchanged until actual sale.

Monk, Q. C., in support of his rule.—It is assumed that all goods delivered to a tradesman in the course of his trade are protected from distress. That, however, is not the principle upon which the exemption rests. To entitle the goods to the privilege, they must be upon the premises for the purpose of being carried, wrought, or manufactured by the person upon whose premises they are found: Read *v.* Burley, Cro. Eliz. 549, 596; Gisbourn *v.* Hurst, 1 Salk. 249. The business of a pawnbroker is not, to carry or to do any work upon goods, but merely to grant loans on the deposit of goods. In the case of the carcase-butcher,—Brown *v.* Shevill, 2 Ad. & E. 138 (E. C. L. R. vol. 29), 4 N. & M. 277 (E. C. L. R. vol. 30),—there was something to be done with the beast. In the case of the wharfinger,—Thompson *v.* Mashiter, 8 J. B. Moore 254 (E. C. L. R. vol. 17), 1 Bingh. 283 (E. C. L. R. vol. 8),—the goods were deposited for the purpose of being "managed" by the wharfinger, and kept safely. In the case of the pawnbroker, the goods are held only as collateral security for the repayment of the loan. The true principle is that laid down by Alderson, B., in Muspratt *v.* Gregory, 1 M. & W. 645†; and it is not to be extended. "The boat," said that learned Judge, "is clearly not within the description of goods delivered to a trader to be *carried* or *wrought* (*i. e.* worked up into another form) in the way of his trade or employ; for, there is nothing to be done to it; it is not brought to be repaired or altered in any way. Then, is it delivered to be *managed* in the way of the trade or employ of the person to whom it is so delivered? In Simpson *v.* *Hartopp, Willes 512, the word "managed" ap- [*488 pears to be used as synonymous with "manufactured." But that is too limited a sense of the expression; for, the Courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer; and also to the dealing with the goods as articles of trade, in their original or their wrought state as articles of commerce, as a factor. And the true principle seems to be, that, where, in order to

the exercising such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered." In Joule *v.* Jackson, 7 M. & W. 450, Parke, B., says: "Primâ facie, every deposit of goods upon the premises where the trade is carried on would have relation to that trade, and an exemption from distress would in that view be for the public good. But, to hold all such goods to be exempt, would be establishing a very wide principle: and the case of Muspratt *v* Gregory having decided that the principle of exemption already laid down in the books ought not to be extended, we are bound by that decision." There is quite as much notoriety in the course of business of a livery-stable keeper as in that of a pawnbroker; and yet it is settled that horses and carriages standing at livery are not exempted from distress for rent: Parsons *v.* Gingell, 4 C. B. 545 (E. C. L. R. vol. 56). "The question," says Wilde, C. J., "in all these cases, is whether the goods are placed in the hands of the tenant merely with the intent that they shall remain upon the premises, or with a view of having labour or skill bestowed upon them,—which is the principal object, and which is incidental? If the goods are sent to the premises for the purpose of being dealt with in the way of the party's trade, and are to remain upon the premises until that purpose is answered, and no longer, the case falls within one class; but, if they are sent for the purpose of remaining there merely at the will of the owner, there being no work to be done upon them, it falls within a totally distinct consideration. The case of a horse sent to a livery-stable *merely* to be cleaned and fed, is very different from one where he is sent to remain during the owner's pleasure, the feeding and grooming being only incident to the principal object. Considering this as the case of a horse that is sent to remain upon the premises, and that all the livery-stable keeper has to do, is, to bestow upon it such feed and management as are requisite to the health and comfort of the animal while there,—under which class does it range itself? The general principle of law undoubtedly is, that all goods found upon the premises are liable to be distrained for rent. Upon that general rule, two exceptions only are engrafted. The first is, where the article is sent for the sole purpose of having the labour or skill of the artisan performed upon it, and is to be returned to the owner as soon as that purpose has been accomplished. Such is the case of a horse sent to the farrier to be shod: the horse is necessarily taken there for the purpose, and necessarily remains there while it is being performed. Such likewise is the case of the tailor, who, it seems, formerly received the materials from the employer to be fashioned into garments. The cloth, or other material, was sent to the shop for the mere purpose of having work done upon it, and was to be returned in an altered shape. These remarks embrace a very considerable range of cases, in which goods are received for the purpose of having something done to them, not for the purpose of occupying the premises. The second exception is, where goods are sent to the party's premises in the way of his trade, for the purpose of sale. It appears to me that all the cases cited that profess to range themselves under this head, strictly do so.

*489]

*490]

Upon what precise ground the privilege of goods at a wharfinger's rests, does not very distinctly appear. I incline to think it arose from the circumstance of there having in former times existed only certain wharfs, at which all persons were *obliged* to land their goods, and at which it does not appear that goods were landed for any other purpose than that of sale. Thompson *v.* Mashiter was the case of goods consigned by the owner to a factor for sale, and deposited by the latter in a warehouse belonging to, and part of, a public wharf, at a weekly rent, until such sale could be effected; and they were held not liable to be distrained. If I am correct in saying that these two classes embrace all the cases of exemption, to which of them does the present case attach itself? Was the mare sent to Thurkettle's stable for the mere purpose of being fed and groomed, or was she sent there for the purpose of being kept on, and occupying the premises? It appears to me that all beyond the occupation of the premises by the mare was merely incidental to her remaining there." That is the distinction relied on here. [KEATING, J.—What labour or skill does a wharfinger exercise upon goods which are intrusted to him in the way of his trade?] His character of wharfinger imposes upon him the duty of receiving, storing, and safely keeping, and of forwarding the goods. [KEATING, J.—These are rather the duties of a warehouseman and of a carrier or forwarding agent.] Johnson *v.* Stear, 15 C. B. N. S. 330 (E. C. L. R. vol. 109), shows that the value of the goods is not necessarily the *measure of the damages for their conversion. By the statute, the pledge is declared forfeited if not redeemed within [*491 twelve months: the plaintiff, therefore, at all events could only be entitled to recover the value of those pledges which had not so become forfeited. There are many cases where the landlord may seize and sell goods which the tenant could himself have no right to dispose of.

ERLE, C. J.—I am of opinion that the rule in this case ought to be discharged. The action is brought by a pawnbroker against his landlord for distraining for arrears of rent goods which had been pledged with him in the way of his trade of a pawnbroker. The governing point is, whether goods which have been deposited with a pawnbroker as security for advances are protected from distress. By our law, goods intrusted to persons carrying on public trades, to be by them dealt with, wrought or managed in the way of their trade, are exempted from distress; and many Judges have attempted to lay down a rule which should embrace all the exemptions: but no very well defined principle is to be found in any of the cases; and in applying it we must be guided as well as we can by the specific instances which have from time to time occurred. It seems to me that the goods now in question fall within the description of goods intrusted to one who carries on a public trade, to be managed and dealt with by him in the way of his trade, and which he had a right to hold until the sums advanced by him upon them were repaid to him. I must confess I am unable to discover any difference in principle between the case of a pawnbroker and that of a wharfinger, factor, or warehouse-keeper. In most cases, these latter have nothing more to do with the goods than to keep them safely,—the ordinary duty of a simple bailee. *So, [*492 the pawnbroker is bound to take care of and safely keep the goods intrusted to him, and he receives a profit for so doing in the

high rate of interest allowed by the statute. I am clearly of opinion that these goods were exempted from distress, on the principle above stated. Then, was the plaintiff entitled to recover damages to the full value of the goods seized and sold? It is said that a pawnbroker only holds the pledge for the money advanced upon it, and the interest, and, therefore, that that is the true measure of damages in an action by a wrongdoer for taking them; and for this the case of Johnson v. Stear, 15 C. B. N. S. 330, was referred to. In that case, my Brother Williams differed from the rest of the Court; he being of opinion that the wrongdoer had no answer to the claim of the plaintiff for damages to the extent of the value of the goods wrongfully taken. The majority of the Court, however, were of opinion, under the peculiar circumstances of that case, that the interest of the owner of the goods was nominal only, and, therefore, that, as against the defendant, he was only entitled to nominal damages for the conversion. That case does not appear to me to have the slightest approximation to the point in issue here. In distraining these goods, the defendant was an absolute wrongdoer. The landlord had no colour of right to take them. The bailee, therefore, is entitled to the full value of the goods. He may retain out of that the sums he has advanced upon them and the interest, and he will be liable to hand over the surplus to the respective owners of the goods. For these reasons, I am of opinion that the rule should be discharged.

WILLIAMS, J.—I am of the same opinion. I think that the goods in question were privileged from distress, on the general ground that *493] they were intrusted *to the plaintiff as a pawnbroker, to be taken care of and dealt with by him in the way of his trade.—like goods deposited with a wharfinger, to be kept (Thompson v. Mashiter, 8 J. B. Moore 254, 1 Bingh. 283), or with an auctioneer, for sale (Adams v. Grane, 1 C. & M. 380,† 3 Tyrwh. 326), or beasts sent to a carcase-butcher to be slaughtered and dressed (Brown v. Shevill, 2 Ad. & E. 138, 4 N. & M. 277). As to the damages, it is clear, that as against a wrongdoer, the plaintiff was entitled to recover the full value of the goods at the time of the wrongful seizure. As to the argument founded on the pawnbroker's statutory right to sell forfeited pledges at the end of the year, I must confess I see no foundation for it.

KEATING, J.—I am of the same opinion. I think goods deposited with a pawnbroker fall within the second clause of the rule in the notes to Simpson v. Hartopp, 2 Smith's Leading Cases 373,—"things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." These goods were clearly delivered to the plaintiff, to be managed by him he carrying on a public trade, in the way of that trade. A pawnbroker is to keep safely all goods pledged with him, and to restore them on demand to the owner, on being paid the money he has advanced upon them and interest. As to the measure of damages, I concur with my Lord and my Brother Williams that the plaintiff is entitled to the value of the goods.

Rule discharged.

*ELWOOD and Another *v.* CHRISTY and Another.

Jan. 27.

[*494

In an action for the infringement of a patent, the Court will only direct an account to be taken, under the 42d section of the 15 & 16 Vict. c. 83, of the profits which have been actually made by the defendant, and not of *the loss which the plaintiff has sustained by the infringement:* and, in the case of an assignee of the patent, the account will only be taken from the date of the registration of the assignment under s. 35.

THIS was an action for the infringement of a patent for an improved hat or helmet for hot climates.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term, when a verdict was found for the plaintiffs. In Michaelmas Term following, the defendants obtained a rule nisi for a new trial, on the ground that the verdict was against the weight of evidence, and upon affidavits. This rule came on for argument in the course of the same term, and was discharged. On a subsequent day, —and before final judgment signed,—

Aston, for the plaintiffs, moved for a rule, in the terms of that granted in Walton *v.* Lavater, 8 C. B. N. S. 191 (E. C. L. R. vol. 98), calling upon the defendants to show cause why an account should not be taken before one of the Masters of this Court of *all profits of which the plaintiffs had been deprived by means of the infringement by the defendants of the letters patent in the declaration mentioned*, and why the defendants should not pay to the plaintiffs the amount of such profits, and why a writ of injunction should not issue to restrain the defendants from continuing to infringe the plaintiffs' patent in the declaration mentioned, and from the repetition and continuance of the injury caused to the plaintiffs by such infringement, and from the committal of any injury of a like kind relating to the said patent right. He submitted to the Court whether, on the authority of Holland *v.* Fox, 3 Ellis & B. 977, the rule should not be absolute in the first instance. Lord Campbell, in delivering the judgment of the Court, there says: "We conceive the meaning of the Legislature in the *enact- [*495
ment relied upon(*a*) to have been, to vest in the Courts of common law, in which actions for the infringement of patent rights may be brought, the power to order an injunction, inspection, and account heretofore exclusively exercised by Courts of equity; so that suitors may be saved the vexation, delay, and expense to which they had before been exposed, in being obliged to go to a Court of equity for an injunction, then being sent to law to establish their legal right by an action, and then being compelled to go back to equity for full redress. The Court in which the action is commenced may now by its own authority do complete and final justice between the parties, by this combination of judicial powers." [ERLE, C. J.—We must hear the other side.] *Aston* further asked for a rule to inspect the manu-

(*a*) 15 & 16 Vict. c. 83, s. 42, which enacts, that, "in any action in any of Her Majesty's superior Courts of record at Westminster and in Dublin, for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or, if the Court be not sitting, then for a Judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or Judge may seem fit."

factories and warehouses of the defendants, in order to see if there were any hats or parts of hats or helmets in course of manufacture in violation of the plaintiffs' patent. [ERLE, C. J.—That would be holding a sort of inquisition in the shop of the manufacturer, for which I find no warrant. As far as Lord Campbell went in Holland v. Fox we will go, but no further.]

The rule was granted, substituting for the words in italics the following,—"all profits made by the defendants by means of the infringement of the plaintiffs' patent."

*496] *Murray now showed cause, upon affidavits stating, amongst other things, that the whole profits the defendants had made from the sale of hats said to be a violation of the plaintiffs' patent right did not exceed 15*l.*, which they were ready to pay over to them. Under these circumstances, it was submitted that there was no necessity for going into an expensive inquiry before the Master, and that the Court would, in the exercise of its discretion, order the sum so admitted to have been received as profit to be paid over at once to the plaintiffs. It was further submitted that the plaintiffs at all events were only entitled to have the account taken from the date of the registration of the assignment of the patent to them under the 35th section of the Act, viz., the 15th of February, 1863.

Hindmarsh, Q. C., and *Aston*, in support of the rule.—The rule ought, as did the amended rule in Walton v. Lavater, to embrace the loss which the plaintiffs had sustained by reason of the infringement. [ERLE, C. J.—No cause was shown there: the case is therefore hardly an authority.] The Court of Chancery has over and over again held that a patentee is to be compensated in the account for the loss he has actually sustained, and is not to be limited to the profit made by the wrongful act of the infringer. [WILLES, J.—Can you refer us to an instance?] In a case of Betts v. De Vitry, it was urged that the profits made by the defendant were an inadequate compensation for the wrong, and the Court gave the plaintiff an issue or an account in the terms now suggested. [*Murray*.—The form of the rule as granted does not ask this.] The Court may mould it. The plaintiffs are clearly entitled to recover from the defendants all the profits they would have made but for the infringement. The statement that the

*497] profits actually made do not exceed 15*l.* is ex *parte*. Both sides ought to be heard on that. The defendants may have purposely kept down the profits, for the purpose of deteriorating the value of the patent. [WILLES, J., referred to Vidi v. Smith, 3 Ellis & B. 969 (E. C. L. R. vol. 77). Pending an action for an infringement of a patent for an invention, the plaintiff obtained, under the Patent Law Amendment Act, 1852, a rule nisi that the defendant should render on oath an account of the sale of the articles (alleged to be pirated) sold before the action, and of the profits made therefrom, and keep an account of the articles to be sold and of the profits therefrom, and that the plaintiff might inspect the defendant's books. The rule was drawn up on an affidavit that the plaintiff had the patent, and that the defendant had infringed it after notice. On cause being shown, it was held that no retrospective account of profits made by sales before the action ought to be ordered before final judgment; and that the inspection mentioned in s. 42 of the Act was

an inspection of the articles, and not of the books; and so much of the rule was discharged. But it was held that the Court had jurisdiction to order an account to be kept in future, though no injunction was asked for, it appearing that there was a primâ facie case of infringement; and the Court ordered that the rule should be absolute for such an account, on condition that the plaintiff elected not to claim damages at the trial, and undertook, if he failed in the action, to pay the defendant the expense of keeping the account so ordered.]

ERLE, C. J.—I think substantial justice would be done in this case if the rule were discharged. But I pause on the ground put by the counsel for the plaintiffs; and I scruple so to decide, because it would be determining in favour of the one side, without giving *the other an opportunity of being heard. The rule must, therefore, be absolute to refer it to the Master to take an account of the profits which have been actually made by the defendants subsequently to the date of the assignment of the patent to the plaintiffs. The assignees of the patent are clearly not entitled to anything beyond the profits which the defendants have actually made by the infringement of the patent. If the plaintiffs do not succeed in surcharging the defendants to the extent of one-sixth beyond the amount admitted by them in their affidavit, the plaintiffs must pay them all the costs of the inquiry before the Master and of this rule: and if they do succeed in satisfying the Master that they are entitled to more than the sum so admitted, such costs will be in the discretion of the Master. [*498

WILLIAMS, J.—It does not appear from the report of Walton *v.* Lavater, that the Court absolutely sanctioned the amended form of rule. The matter was not contested.

WILLES, J.—I am of the same opinion. We do not decide that the plaintiffs could not recover in the cause any damages they may have sustained by the course of conduct suggested by the counsel who have argued in support of this rule. All we decide is, that such damages can only be recovered at the hands of a jury, and not by means of an account taken before the Master under the 15 & 16 Vict. c. 83, s. 42. Rule absolute accordingly.(*a*)

(*a*) The rule was drawn up as follows:—

"It is ordered that one of the Masters of this Court do take an account of all profits actually made by the defendants by means of the infringement of the plaintiffs' patent, from the date of the registration of the assignment, and that the said defendants do pay to the plaintiffs the amount of such profits: And it is further ordered, that, unless the amount stated by the said defendants in their said affidavit to be due to the plaintiffs for such profits be increased by one sixth of the said amount, upon the taking of the said account by the Master, the said plaintiffs do and shall pay to the defendants, or to the their attorney, their costs of and occasioned by this application to the Court, and of the said reference to the Master, to be respectively taxed, &c.; but, in the event of such amount so stated by the said defendants being increased by one-sixth of the amount thereof, then it is ordered that the before-mentioned costs be in the discretion of the said Master: And it is further ordered that a writ of injunction do issue forth of this Court to restrain the said defendants from continuing to infringe the patent right of the plaintiffs in the declaration in this cause mentioned, and from the repetition and continuance of the injury caused to the plaintiffs by such infringement, and from the committal of any injury of a like kind relating to the said patent right."

FIELDING *v.* LEE and Another. *Feb.* 6.

A County Court Judge (sitting as a commissioner in bankruptcy) made an order under the 125th section of the 12 & 13 Vict. c. 106, "that the household goods, furniture, and effects being in or about the messuage or dwelling-house and premises in the occupation of the said T. T. (the bankrupt) in C. Street, M., and known as the Cross Keys, be sold and disposed of by the assignees, for the benefit of the creditors of the said T. T." There was a minute of this order in the court book, which was produced:"—Held, that this order was a valid order, and sufficiently specific.

THIS was an action for the wrongful conversion and for seizing and selling certain household furniture, &c., of the plaintiff.

The defendants pleaded,—first, not guilty, by statute (the statutes referred to in the margin being the 12 & 13 Vict. c. 106, s. 159, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 54, s. 6),—secondly, a denial that the goods were the property of the plaintiff,—thirdly, that, *500] after the passing of the Bankruptcy Act, 1861, *one Thomas Taylor was duly declared a bankrupt, and that a warrant of seizure was duly issued by the Judge of the Court having jurisdiction in the matter of the said bankruptcy, whereby the bailiffs of the said Court and others were required to *enter into and upon the house of the said bankrupt*, and then and there *to seize the goods of the said bankrupt*, and in case of resistance, or of not having the key or keys of any door or lock of any premises belonging to the said bankrupt where any goods of his were or were suspected to be, to break open or cause the same to be broken open, for the better execution of the said warrant; that John Harper, a bailiff of the Court, entered into the house of the bankrupt, and took peaceable possession of certain goods; that Harper was afterwards ejected therefrom; and that the defendants thereupon entered the said house for the purpose of enabling the said John Harper to assist in the execution of the said warrant, and seized, took, and carried away the goods in the declaration mentioned, which were the grievances complained of,—fourthly, that the plaintiff had given the defendants no notice of action, as required by the statutes.(a)

The plaintiff took issue on the first and second pleas, and new-assigned to the others that the grievances complained of were committed on other and different occasions, &c. The defendants pleaded not guilty to the new assignment.

The cause was tried before Mr. Serjt. Atkinson, at the last Summer Assizes at Manchester. The facts which appeared in evidence were as follows:—In September, 1863, the furniture, &c., of one Taylor were seized under a writ of fi. fa., and sold by public auction. The *501] plaintiff bought the furniture, &c., at the *sale, and paid for them: but he allowed them, at the request of and for the accommodation of Taylor's family, to remain in Taylor's house. They were afterwards removed by Taylor to a beer-shop, called the Cross Keys, at Middleton, near Manchester, where he and his family went to live. They were seized there in the month of June following by the two defendants, as hereafter mentioned. There was evidence to show that Taylor was the real occupier of this beer-shop, and that his sons-in-law (Ogden and Kenyon) were only ostensibly so.

(a) 9 & 10 Vict. c. 95, s. 138, 13 & 14 Vict. c. 61, s. 19, and 15 & 16 Vict. c. 54, s. 6.

On the first of April Taylor was declared a bankrupt; and the defendant Lee was appointed creditors' assignee.

On the 6th of June, upon the application of Lee, an order was made by the Judge of the County Court, sitting in bankruptcy, the operative part of which was as follows:—"That the household goods, furniture, and effects, being in or about the messuage or dwelling-house and premises in the occupation of the said Thomas Taylor, in Cross Street, Middleton, and known as the Cross Keys, *be sold and disposed of by the assignees*, for the benefit of the creditors of the said Thomas Taylor."

The admissibility of this order was objected to; but the learned Serjeant received it.

A warrant was also issued. It was in the terms set forth in the third plea. Under this warrant the high bailiff of the County Court seized all the furniture and effects in the Cross Keys (including that which had been bought by the plaintiff in September, 1863), and left one Harper in possession. Harper was turned out, but, with the aid of the two defendants, regained possession. A few days after this, viz. on the 8th or 9th of June, the two defendants caused all the furniture, &c., to be removed from the Cross Keys, and taken to *the auction-room of the defendant Aspinall, who, in the presence of the other defendant, and by his direction, sold them. The bailiffs of the County Court were indemnified by Lee. [*502

It was admitted that the defendants had received no notice of action; and it was contended on their behalf,—first, that they were entitled to notice,—secondly, that the goods had been bailed to Taylor, and that the action should have been brought in his name,—thirdly, that the goods were in the possession, order, and disposition of Taylor at the time of his bankruptcy, and that the defendants were justified in *seizing and selling* them.

The learned Serjeant ruled,—first, that the action was rightly brought, if the goods were the bonâ fide property of the plaintiff,—secondly, that the statutes referred to did not apply to the *sale* by the defendants in June. He said that the new assignment gave, as it were, the go-by to the facts alleged in the third and fourth pleas, and put the plaintiff's cause of action upon a new and different ground from what was relied on in those pleas, viz. upon the *sale* in June; and to this, he said, the bailiffs could not offer any justification under the warrant, which only authorized a *seizure*, and not a *sale;* much less could two persons *sell*, who had no authority at all. But, as the learned Serjeant thought that the order of the County Court, if admissible in evidence, might warrant the sale, he reserved the whole matter for the consideration of the Court above,—leaving them to deal with the issues on the third and fourth pleas as they might under the circumstances think fit.

The defendants' counsel then went to the jury, contending that the whole transaction was a juggle for the purpose of defeating the creditors of Taylor: and several witnesses were called.

*In his summing up, the learned Serjeant told the jury, that, as the *sale* by the defendants in June was not disputed, the only question, under the circumstances, was, whether the goods were the bonâ fide property of the plaintiff at the time they were sold by the defendants, or his only colourably, they being in reality the property [*503

of Taylor; and that the fact of their being left in Taylor's possession or under his control after the plaintiff bought them at the sale in September, 1863, was to be regarded not as a matter of order and disposition, but as a circumstance affording material evidence of their being Taylor's property, and not the bonâ fide property of the plaintiff.

The jury returned a verdict for the plaintiff, damages 17*l.* 15*s.* 9*d.*

S. Temple, Q. C., in Michaelmas Term last, obtained a rule calling upon the plaintiff to show cause why a nonsuit should not be entered, on the ground that no notice of action was proved to have been given; or why the verdict entered for the plaintiff on the third issue should not be set aside, and instead thereof a verdict be entered for the defendants, pursuant to the leave reserved, on the ground that the third plea was proved; or why there should not be a new trial, on the ground of misdirection on the part of the learned Serjeant, in telling the jury, —first, that no notice of action was necessary,—secondly, in telling them, that, upon the pleadings, the defendants could not set up as an answer to the action that the goods were in the order and disposition of the bankrupt as reputed owner.

E. James, Q. C., *Baylis*, and *Pope* now showed cause.—It is the County Court Act (9 & 10 Vict. c. 95, s. 138) that requires notice of action. Under the *Bankruptcy Act, 1849, none is required. *504] If, therefore, this was a proceeding in bankruptcy, the plaintiff was not bound to give any notice. The powers conferred upon the County Court Judges to act in bankruptcy under the 24 & 25 Vict. c. 134, s. 3, create an additional and separate jurisdiction, giving to those Judges all the duties and authorities possessed by commissioners in bankruptcy, but not annexing the privilege here contended for. Persons acting under the metropolitan commissioners are not entitled to notice of action: there can be no reason, therefore, why persons acting under the orders of County Court Judges whilst sitting as commissioners in bankruptcy should have greater privileges. The 19th section of the 13 & 14 Vict. c. 61 refers to warrants issued under the authority of *that* act; and the provisions of that section are not incorporated in the Bankruptcy Act, 1861. Now, in September, 1863, the plaintiff became the owner of the goods in question. It was so found by the jury, and cannot now be disputed. In June, 1864, those goods were *seized* and *sold* by the defendants. There was *a minute of an order* in the Court book which directed the bankrupts' goods, or any goods in his order and disposition, to be sold. There was also a *warrant* directed to certain bailiffs, authorizing them to *seize* them. But neither the one nor the other justified the sale by the defendants. Again, as regards the order, assuming it to be an order empowering the defendant Lee, as assignee, to sell under the 125th section of the Bankrupt Law Consolidation Act, 1849, which provides that, "if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner, the *505] Court shall have *power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy,"—that affords the defendants no justification. To entitle the assignees to take goods as being in the order and disposition of the bankrupt at the

time of his bankruptcy with the consent of the true owner, not only must there be an order under this section, but it must specify and accurately ascertain whose and what are the goods to which the order is directed: Heslop *v.* Baker, 8 Exch. 411;† Quartermaine *v.* Bittleston, 13 C. B. 133 (E. C. L. R. vol. 76). In the last-mentioned case, it was held that an order by a commissioner in bankruptcy, "that all goods and chattels which at the time the said A. B. became bankrupt, were, by the consent and permission of the true owner thereof, in the possession, order, or disposition of the said A. B., whereof the said A. B. was reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as owner," should be sold for the benefit of the creditors, was not a compliance with the 125th section of the 12 & 13 Vict. c. 106: it must specify the particular goods which are to be sold. Jervis, C. J., there says: "Without particularizing what ought to be stated in the order, I am of opinion that a mere general order for the sale of all goods which were in the possession, order, or disposition of the bankrupt with the consent of the true owner, does not satisfy the requirements of the statute. I think, considering that the order for sale may be made ex parte, as is now settled by Ex parte Barlow, in re Marygold, 2 De Gex, M'N. & G. 921, it should at all events be specific as to the goods upon which it is to attach. If that be necessary, this order, which professes to authorize in general terms the sale of all goods which were in the order or disposition of the bankrupt at the time of his bankruptcy, is clearly insufficient. That it was the [*506 *intention of the legislature to require a specific order, may I think be gathered from one or two sections subsequent to the 125th, where similar words are used, which clearly would not be satisfied without a specific order. Thus, the 126th section enacts, 'that, if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or to any other person, any hereditaments, offices, fees, annuities, houses, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person, or into any other person's name, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy; and every such sale shall be valid against the bankrupt and such children and persons, and against all persons claiming under him.' There it is plain, the specific hereditaments or chattels which are to be operated upon by the order must be distinctly pointed out. A general order like this clearly would not do. Upon petition, it must be upon an ex parte application, as the Lords Justices have decided, it may be: but it must be specific. The commissioner must be satisfied that some property or some chattels have been assigned or delivered or made over, and must order the sale of that specific property or those specific chattels." And after referring to the similar language of the 127th and 128th sections, his Lordship adds: "It seems to me, therefore, that, viewing the 125th section in connection with those which follow, and taking it with the explanation afforded by the Court of Exchequer in Heslop *v.* Baker, as there must be an order of the commissioner to vest property like that in question in the assignees, it must, in order

*507] to satisfy the *requirements of the statute, be a specific order, pointing to the particular goods intended to be so vested." And Maule, J., says: "This provision of the new Bankrupt Act varies from those of the former statutes relating to bankrupts. Under those, all property of which the bankrupt was the reputed owner, and which he had in his possession, or of which he had taken upon himself the order and disposition as owner, with the consent of the true owner, vested at once in his assignees, as much as if it had really and actually been the property of the bankrupt. That certainly was a provision which dealt much more favourably with the interests of the creditors than with those of the true owner. The main object of the legislature was, to cause to be distributed amongst the creditors all property which ought to be so distributed. There was, however, in that state of things, danger that the true owner might suffer considerable vexation. It was uncertain, when the assignees seized the goods, whether they claimed them as the general property of the bankrupt, or under the reputed ownership clause. It constantly happened, when a question arose between the assignees and one who claimed the goods as owner, that the assignees could make out their case either by showing that the goods were actually the property of the bankrupt, or by claiming them as being in his order and disposition as reputed owner with the consent of the true owner. The depriving a man of his property under these circumstances was certainly rather hard,—more particularly as it was considered a species of delinquency in the true owner of the goods to concur with the bankrupt in obtaining a false credit, by enabling him to pass for the owner of goods which in truth were not his. Now, the object of the 125th section of the 12 & 13 Vict. c. 106, was to prevent the assignees from taking goods so circum-

*508] stanced, unless *they were in a position to make it appear before a competent jurisdiction that there was a primâ facie case for seizure of the goods. In the case of a trial before a jury, the inquiry must necessarily be directed to certain specific goods: it would be, whether certain specific goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner. The order in this case does not mention any specific goods, or name any specific owner. I do not say that the latter would be necessary in all cases. But there should be some specific description of the goods intended to be dealt with under the order." [BYLES, J.—How would you have had the goods described here?] As "the goods seized by the bailiff," or "the goods claimed by Mr. Fielding."(a)

Temple, Q. C., *Wood*, and *Torr*, in support of the rule.—The first and main question is, whether the learned Serjeant was justified in presenting the case to the jury as he did. The true question was this,—were the goods in the order and disposition of Taylor or not? If they were, Lee was justified in selling them. The plea of not guilty by statute refers to all the grievances complained of in the declaration. There was no new assignment which touched the plea of not guilty by statute: therefore, the reason given by the learned Serjeant for saying that the *sale* in June was not under the circum-

(a) At the trial no objection was made to the generality of the order: the objection was to its admissibility in evidence,—a fact not noticed in the argument.

stances justifiable, was wrong. The issues were not, as he said, co-extensive. It might be wrong to have a general and also special pleas on the record together: but that was not and could not be a question at the trial. As to the form of the order, *it is difficult to see how it could under the circumstances be more specific [*509 than it was here. [BYLES, J.—It is said the commissioner has never exercised his discretion as to the particular goods.] In Graham *v.* Furber, 14 C. B. 134, 156 (E. C. L. R. vol. 78), Maule, J., says: "Formerly, if goods were in the order and disposition of the bankrupt at the time of the bankruptcy, they might be dealt with as any other goods of the bankrupt. Now, if the assignees wish to sell goods so circumstanced, they have the same power as they had before, only their discretion is to be guided by the Court or the commissioner. It may be, that, if the assignees cannot find out what or where the goods are, the commissioner might be authorized to make a general order to sell all the goods in such a place, or all the goods in the hands of the bankrupt: but, where it is known whose and what the goods are, the order ought to specify them. I think that is the sort of thing that was intended. I think it would be a strange thing, and a monstrous hardship, if, when from the time of the Statute of James downwards there had existed no right of depriving a man of his goods, without giving him an opportunity of being heard, they should be finally lost to him by means of an affidavit made behind his back, alleging the goods to have been with his consent and permission in the possession, order, and disposition of the bankrupt at the time of the fiat or petition. That would be depriving him of his trial by jury, without giving him an equivalent for it. The Legislature does not divest persons of their rights without express words." In Quartermaine *v.* Bittleston, it was taken for granted that the order may be obtained upon an ex parte application. The order here was as specific as it could be. It clearly was not necessary to mention the name of Fielding as the owner of the goods. [BYLES, J.—The substance of the objection is, *that the order does not mention the nature or value of the goods to be seized: it is,—"Take [*510 and sell all the goods in the possession of Taylor in the Cross Keys."] It would impose incalculable hardship and difficulty upon assignees, if they are held bound to ascertain beforehand who will thereafter appear as claimant, and what the specific goods are that are not absolutely the bankrupt's property. The very thing suggested in the judgment in Quartermaine *v.* Bittleston has happened here. The assignee did not know and had not the means of knowing who was the true owner of these goods. In Freshney *v.* Carrick, 1 Hurlst. & N. 653,† it was expressly determined by the Court of Exchequer that an order under the 125th section of the 12 & 13 Vict. c. 106, is sufficient, if it specifies the goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods. Martin, B., there says: "As to the order, it follows the words of the Act; and, unless there are cases directly the other way, we are bound to hold that it vests the goods mentioned in it in the assignees. In Quartermaine *v.* Bittleston there was a general order, not giving particulars of the goods: the Court of Common Pleas held that it was bad, and rightly so. The attention of the commissioners ought

to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods." The order here is quite as specific as the order was in that case.

ERLE, C. J.—I am of opinion that the rule should be made absolute for a new trial. The action is in trover and trespass, and is brought by Fielding, the alleged owner of the goods in question, against Lee the assignee in bankruptcy of one Taylor, and the other *511] *defendant, who acted as Lee's agent. The defendants have pleaded not guilty by statute. The evidence was, that Lee caused the goods to be seized under the rights he had as assignee of Taylor. Assuming that the plaintiff was the true owner of the goods, and that they were at the time of the seizure in the possession, order, or disposition of Taylor, Lee had a right to seize and sell them for the benefit of the creditors, provided he qualified himself so to do by a proper order of the Judge of the Court of Bankruptcy, under the 125th section of the 12 & 13 Vict. c. 106. By the 159th section of the Act it is provided, that, in any action for anything done in pursuance of the Act, the defendant may plead the general issue and give the Act and the special matter in evidence at the trial, and that the same was done by authority of the Act. If these three matters are given in evidence, they establish a defence to the action, inasmuch as they prove affirmatively that the alleged wrongful act was done under the authority of the statute. Now, there was evidence to go to the jury that Fielding was the true owner of the goods, and that they were in the possession, order, and disposition of Taylor at the time of his bankruptcy, with Fielding's consent; and there was, I think, some evidence of an order of a Judge in bankruptcy. The argument, however, has turned chiefly on the validity of the order which was made. The course taken at the trial seems to have been to regard the issues raised under the general plea and under the special pleas as the same in kind and degree. I am of opinion that they were not, under the circumstances. If the order was admissible under not guilty by statute, and there was evidence that the goods were in the order and disposition of the bankrupt at the time of his bankruptcy, there were the ingredients of a defence. Then, was there a valid *512] order under *s. 125? The order was in these terms,—"That the household goods, furniture, and effects now being in or about the messuage or dwelling-house and premises in the occupation of the said Thomas Taylor, in Cross Street, Middleton, and known as the Cross Keys, be sold and disposed of by the assignees for the benefit of the creditors of the said Thomas Taylor." Is that a *sufficient* order under s. 125? In Heslop *v.* Baker, 8 Exch. 411,† it was held that an order under that section was sufficient though it did not state positively that the person who claimed to be the true owner of the goods was in fact the true owner. In Quartermaine *v.* Bittleston, 13 C. B. 133, the order was in the most general terms,—in the nature of a general warrant: it directed that "all goods and chattels which at the time the trader became bankrupt were by the consent and permission of the true owner thereof in the possession, order, or disposition of the trader, whereof the bankrupt was the reputed owner, or whereof he had taken upon himself the sale, alteration, or disposition as

owner," should be sold for the benefit of the creditors: and this Court held that it was not a compliance with the statute, inasmuch as it did not specify the particular goods which were to be so sold. Here, the order is more specific than that: it does in some degree make it clear what it is that the assignees are to sell, viz., all the household goods, &c., in the possession of the occupier of the Cross Keys. I cannot help feeling that there is much force in the argument which has been urged on the part of the defendants, that the object of this enactment was to protect persons dealing with a trader from claims which are too often put forwards by the bankrupt's friends to shield him in his difficulties; and that, if it were held necessary in every case to find the true owner, and that he and the goods which are to be seized must be described and specified *in the order with absolute accuracy and minuteness, the very object of the statute would be frustrated. I therefore think this order constat de corpore to some extent. It is a direction to go to the Cross Keys and seize all the household furniture and effects found there. Some identification is given. I should have come to this conclusion without any authority: but, if necessary, Freshney *v.* Carrick, 1 Hurlst. & N. 653,† fully warrants it. Baron Martin in his judgment there expresses himself very much in the terms in which I have attempted to express myself here. There is particularity enough in this order to prevent the objection which arose as to the generality of the orders in the cases cited. For these reasons, I am of opinion that there should be a new trial. [*513

BYLES, J.—I am of the same opinion. The goods were in the possession of the bankrupt at the time of the bankruptcy. There was evidence that there was a true owner, as contradistinguished from the apparent owner, and that the goods were in the possession of the bankrupt with the consent of the true owner; and there was, I think, some evidence of an order of a Commissioner under the 12 & 13 Vict. c. 106, s. 125, that the household goods, furniture, &c., in the messuage or dwelling-house occupied by the bankrupt (describing it) be sold and disposed of by the assignees for the benefit of the creditors. If the jury believed that evidence, they should have found a verdict for the defendants if the pleadings had been right. Some embarrassment has arisen from the form of the order: and we are much obliged to Mr. *Wood* for the authority which he brought to our notice. Such an order as that which was relied on in Quartermaine *v.* Bittleston, 13 C. B. 133, must be wrong. It contained no description whatever of the goods upon *which it was to operate. But here the goods are described to a certain extent,—"the goods in and about the messuage, &c., in the occupation of Taylor, in Cross Street, Middleton, and known as the Cross Keys." It is objected that it is not stated who the claimant is, or whose goods they are. The observations of Martin, B., in that case (Freshney *v.* Carrick, 1 Hurlst. & N. 653) are specially applicable to this. "The attention of the Commissioners," he says, "ought to be called to the particular goods, but the order need not state that it is made against different parties, some of whom claim one part, some another part of the goods." Here, there were two claimants to the goods, namely, Kenyon and Fielding. It seems to me, that, in such a case as this, the Commissioner was not bound to give the names of the owners. As to the goods themselves, [*514

it seems to me to be sufficient to describe them as they are virtually described in this order,—"all the household goods, &c., in a certain public-house in the occupation of the bankrupt, part of which belong to the bankrupt and part to a claimant." It may be that that was the best description which could be given. If this objection had been urged at the trial, it might peradventure have been answered. Then, are the defendants embarrassed by the state of the pleadings? I agree with all that has been said by my Lord as to the issue on not guilty by statute. The 159th section of the 12 & 13 Vict. c. 106, enables the defendant to plead the general issue and give the Act and the special matter in evidence. I am not prepared to say that the defence was not also admissible under not possessed.

KEATING, J., had gone to Chambers. Rule absolute.(a)

(a) Upon the second trial the result was the same, and there was no attempt to disturb the verdict.

*515] *REBECCA BOURNE, by JOHN BOURNE, her Father and next Friend, v. FOSBROOKE. *Feb.* 11.

1. A mere parol gift of a chattel, unaccompanied by delivery of possession, passes no property therein.

2. A wife, though living apart from her husband, cannot lawfully dispose by gift (even accompanied by actual delivery of possession) of chattels acquired by her during the coverture. But, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent to the defendant to set up the title of the husband.

3. A., as executor of B., seized and sold as the goods of his testator a watch and several articles of dress and jewellery which C., the niece of B.'s deceased housekeeper, claimed to be hers by gift, some of them from her aunt, and some from B., in whose house she had for many years lived with her aunt as a sort of adopted member of the family. The jury having found upon sufficient evidence that the articles in question had in fact been given to C., and were in her "possession" at the time of the conversion,—Held, that C. was entitled to recover their value; and that it was not competent to A., who was a mere wrongdoer, to urge, that, as to those articles which came to C. by gift from her aunt, the latter, having a husband living (who, however, made no claim to them), had no authority to dispose of them.

THE first count of the declaration was for the detention, the second for the conversion and wrongfully depriving the plaintiff of the use of certain goods.

The defendant pleaded,—first, to the first count, that he did not detain the goods, as alleged,—secondly, to the second count, not guilty,—thirdly, to the whole declaration, that the goods were not the goods of the plaintiff. Issue thereon.

The cause was tried before Channell, B., at the last Summer Assizes at Leicester. The facts which appeared in evidence were as follows:—

The defendant was executor under the will of one William Fosbrooke, of Lockington, in the county of Leicester, who died on the 13th of January, 1864. The plaintiff, a young lady about seventeen years of age, was the daughter of one John Bourne, and niece of one Susan Philips who had lived with the testator as his housekeeper for many years. In the year 1853, the plaintiff, who was then between six and seven years of age, went to the house of the testator, on a visit to her aunt. During her stay there, the testator became much attached to her, and (having no children of his own) ultimately in a

manner adopted her as one of the family, sending her to school, first at Donnington, and afterwards at Oxford, and making his house her home during her holidays. In 1863, Susan *Philips died, and the plaintiff continued to reside at the house of the testator, on the same footing as before, down to the time of his death. [*516

During the lifetime of Susan Philips, she had from time to time made the plaintiff presents, consisting of silk dresses, a shawl, a watch, and some brooches, rings, and other articles of jewellery. Some of these had been gifts from the testator to Susan Philips. The testator also had made the plaintiff various presents, including, as was alleged, a pianoforte. All these articles were left by the plaintiff in the house of the testator whilst she was at school: those things which her aunt had given being placed in boxes and a drawer, which were kept locked, the keys being labelled, in the handwriting of the testator, "Becky's keys," and being retained by the plaintiff in her own possession when at Lockington for her holidays, but hung up on a nail in a cupboard in her room when she was absent. Some of the articles in these boxes and drawer were also labelled, in the testator's handwriting, "Beck's;" others were not.

It appeared that Susan Philips had in the year 1861 married one William Hogg, but had lived with him only three weeks or a month, when he deserted her and went to reside at Bethnal Green, where he had ever since continued to reside, cohabiting with another woman. On the death of Susan Philips, Hogg (the husband) went to the testator's house at Lockington, and claimed the things which belonged to her. His claim, however, was repudiated by the testator, who told him there were many heavy expenses for him to pay before he could claim them, and that they had been given to the plaintiff and her mother; and moreover that he (the husband) had no right to them, as he was living in a state of adultery with another woman. Hogg never made any further claim to the property.

*After the death of the testator, his effects were taken possession of by the defendant as his executor; and all the articles which he found labelled as belonging to the plaintiff he gave up to her or to her mother: the rest of the articles (including the pianoforte, which fetched 30*l.*) were sold by the defendant's direction. [*517

On the part of the defendant, it was insisted, that, though there might have been a verbal gift of some of the articles in question from the testator to the plaintiff, they had never been so reduced into possession by the latter as to pass the property in them to her; and, as to the articles which were given to her by her aunt, Susan Philips, that, she being a married woman, they were the property of her husband, and she could not lawfully dispose of them.

For the plaintiff it was submitted that she had a sufficient title to and possession of the goods to entitle her to maintain an action against a wrongdoer for the conversion of them, and that it was not competent to the defendant under the circumstances to set up the title of Hogg, the husband.

The learned Judge told the jury that the property in a chattel would not pass by a mere verbal gift without actual transfer of possession; and, in answer to questions put to them, the jury found, in respect of the goods claimed by the plaintiff as having been given to

her by her aunt, that, supposing she had been a single woman, there was a sufficient transfer of possession; and they assessed the value of them at 25*l.*: and, as to the goods claimed as gifts from Mr. Fosbrooke, the testator (viz. the piano and other articles), the jury found that there had been no transfer of possession, though there was a verbal gift.

His Lordship thereupon directed a verdict to be entered for the defendant, but reserved leave to the plaintiff to move to enter a verdict for her for 25*l.*, if, *upon the finding of the jury, the Court should be of opinion that the plaintiff was entitled to recover, notwithstanding her aunt, Susan Philips, the donor, was a married woman.

*518]

O'Malley, Q. C., in Michaelmas Term last, obtained a rule nisi accordingly.

David Keane, Q. C., and *Merewether* now showed cause.—Prima facie, the husband is entitled to all personal property of the wife. A Court of equity will, under some circumstances, interfere to protect the interest of the wife; but never a Court of law. There was, however, no evidence here upon which even a Court of equity could see such a trust on the part of the husband as would give Susan Philips a right to dispose of these goods as she assumed to do. The husband's misconduct, or a sentence of divorce, are said to raise an implied trust: but here there is nothing but the fact of the husband and wife living apart, without any evidence of the circumstances under which the separation took place. In Lamplin *v.* Creed, 8 Ves. 599, a married woman living in trade without the interference of her husband, residing in a different part of the kingdom, advanced money for the purchase of a share in a lottery-ticket, upon an agreement with the plaintiff that half should be considered as a loan to him, and that they should be jointly concerned in the adventure: and it was held, that, the money belonging to the husband, the produce was his. In Bright on Husband and Wife, Vol. 2, p. 220, it is said: "With respect to personal estate, it has been settled since the case of Fettiplace *v.* Gorges, 1 Ves. jun. 46, 3 Bro. C. C. 8, that, when personal property is actually given or settled, or is agreed to be given or settled, to the separate use of a married *woman, she may dispose of it as a feme sole to the full extent of her interest." But here there was no settlement or agreement to settle; nothing whatever to interfere with the undoubted rights of the husband. In Carne *v.* Brice, 7 M. & W. 183,† the property in wearing apparel bought for herself by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, was held to vest by law in the husband, and to be liable to be taken in execution for his debts. The same rule must prevail where the husband and wife are living apart, as here. In Messenger *v.* Clarke, 5 Exch. 388,† a husband and wife separated by agreement, and at that time the husband agreed to allow the wife a certain sum weekly for her support, which was paid: she saved a portion of her allowance, and invested it in stock, but, a few days before her death, she sold out the stock, and disposed of the proceeds by way of gift: and it was held that the husband was entitled to recover back the money so given, in an action for money lent

*519]

against the person who received it. Rolfe, B., there says: "All the cases which have been cited are cases in equity, and there is no doubt that a wife may dispose of her separate property. And this is so, although trustees may not have been appointed; for, in such a case, in a Court of equity the husband may be looked upon as trustee for his wife, according to the well-known rule in those Courts, that a trust shall never fail for want of a trustee." So, Platt, B.: "The authorities cited are cases in the Courts of equity, where the property in question was that of the husband in point of law, but where he was considered as trustee for his wife by the Courts of equity, which interfere to compel him to perform the trusts." In Tugman *v.* Hopkins, 4 M. & G. 389 (E. C. L. R. vol. 43), 5 Scott N. R. 464, certain stock in the Long Annuities was by a marriage settlement *vested in trustees for the separate use of the wife for life, and after her death they were to pay over the principal sum, together with the interest and dividends then due and growing thereon, to such person as she might by will appoint. By her will (reciting the settlement), she appointed executors, and directed them to sell the principal stock. The proceeds thereof she bequeathed to different parties. At her death (for some time previously to which she had lived apart from her husband), a sum of money was found at her lodgings, which was taken possession of by the defendant, the son of one of the executors, at the request of his father, to whom he immediately paid it over: and it was held, that, assuming the money in question to consist of the accumulations of the wife's dividends, the will did not dispose of it; that, as the executors did not take jure representationis, *they* were not entitled to the money; that the money vested in the husband at his wife's death, without his taking out administration; and that, as the defendant was a wrongdoer in taking the money, he was liable in an action for money had and received at the suit of the husband. Tindal, C. J., in giving judgment, after referring to Comyns's Digest, *Baron and Feme* (E. 3.), (*a*) said,—"It has been admitted in the course of the *argument, that, if this money had been taken away during the lifetime of the wife, the action must have been brought by the husband alone. Perhaps in such a case he would have been considered in equity as a trustee for the wife; but, at law, the action must have been brought by him. The case of Carne *v.* Brice is a strong authority in favour of the husband's right to the money: and Molony *v.* Kennedy, 10 Simons 254, shows that he was entitled to the possession of it, without taking out administration to his wife. These authorities, therefore, dispose of the first part of the case, and establish that the husband was, at law, entitled to the money sought to be recovered in this action." In Bird *v.* Peagrum, 13 C. B. 639 (E. C. L. R. vol. 76), a married woman deposited with the defendant the savings of certain rents of leasehold property which had

[*520

[*521

(*a*) The passages referred to in Comyns's Digest are as follows,—"All chattels personal which a wife has in possession in her own right, are vested in her husband by the marriage, though he do not survive. So, chattels personal not in possession at the time of the marriage, if they are reduced into possession during the coverture. So, chattels personal of a mixed nature, partly in possession and partly in action, the husband shall have if he survives; as, an avoidance of a church, which falls during the coverture. So, chattels are given to the wife after the coverture, the interest vests in the husband, though he has not possession of them before the death of his wife."

on her marriage been conveyed by her, with the consent of her intended husband, to trustees, upon trust to pay or permit her to receive the rents, &c., to her sole and separate use: and it was held, that, the trust being discharged on the rents coming to the wife's hands, the trustees ceased to have any interest in or control over them; and that, upon the wife's death, her husband was entitled to bring an action, in his own right, to recover the money so deposited. In the course of the argument (see 22 Law J., C. P. 169), Williams, J., says,—"Can it be contended that a Court of law recognises a married's woman's right to have money of her own in her possession? Where goods and chattels,—furniture, for instance,—are settled on a married woman, without the intervention of a trustee, it cannot be doubted, that, in the eye of the law, they belong to the husband, although in a Court of equity he would be considered as a trustee for his wife." According to the authority of Bradshaw *v.* Beard, 12 C. B. N. S. 344 (E. C. L. R. vol. 104), the expenses of the wife's funeral

*522] *might have been set off against the husband's claim to this property. If it be said that these things might be considered as the wife's paraphernalia,(*a*) the wife being dead, that doctrine can have no application. In no view of the case could the wife have any jus disponendi as against the husband. There must be a complete divesting of the husband's right, before there could be a power of disposition on the part of the wife,—Walter *v.* Hodge, 2 Swanston 92. There was no evidence to show a divesting of the property in question out of the husband. As soon as he heard of his wife's death, he appeared and claimed the property: and there is nothing to prevent the defendant from setting up his title against the right of the plaintiff to maintain this action.

O'Malley, Q. C., and *Markby*, in support of the rule.—The only question is, whether Susan Philips had a right, as against this defendant, who is a mere wrongdoer, to dispose of the articles of dress and trinkets as she did; for, if she had, they had clearly passed into the possession of the plaintiff. All the cases relied on by the defendant are cases where an execution-creditor claimed, standing upon the rights of the husband, or where the husband or the husband's executors came into direct collision with the wife; and all of them were cases where the property had not been disposed of by the wife during her lifetime. Here, it must be assumed that the husband gave the wife power to dispose of the goods at her free will and pleasure; and that is a sufficient answer even to a claim by the husband, under not possessed: Ringham *v.* Clements, 12 Q. B. 260 (E. C. L. R. vol. 64). This is the simple case of a wrongdoer taking the goods out of the

*523] possession of one who is *primâ facie the rightful owner of them. There is no pretence for saying that the husband makes any claim, or that the defendant has a right to set up his title as against the plaintiff. In Sutton *v.* Buck, 2 Taunt. 302, it was held that possession of a ship under a transfer void for non-compliance with the ship's registry Acts, is a sufficient title in trover against a stranger. "There is enough property," said Lawrence, J., "in this plaintiff to enable him to maintain trover against a wrongdoer; and, although it has been urged that the contract is void with respect to

(*a*) As to these, see the case of Graham *v.* Lord Londonderry, 3 Atk. 393.

the rights of third persons as well as between the parties themselves, yet, as far as regards the possession, it is good as against all except the vendor himself. There is a difference made in the books between a wrongdoer and one acting under the colour of a title. In the case of Armory *v.* Delamirie, 1 Stra. 505, the bare possession was held sufficient in order to recover against a wrongdoer; yet that boy had no more title to the jewel than the plaintiff to this ship." So, in Fyson *v.* Chambers, 9 M. & W. 460,† it was held that a party who has taken possession of the goods of an intestate after his death, cannot set up as a defence to an action of trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15*s.* in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees,—the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them.(*a*) In giving the judgment there, Lord Abinger says: "The defendant in this case is not the assignee, and has no right to set up a title of third persons to cover his own default." Herbert *v.* Sayer, 5 Q. B. 965 (E. C. L. R. vol. 48), is an authority to the same effect. In Buckley *v.* Gross, 32 Law J., *Q. B. 129, a distinction was taken, because the plaintiff never had lawful possession of the tallow at all. [*524

ERLE, C. J.—I am of opinion that this rule should be made absolute. The plaintiff claims to recover from the defendant the value of certain articles which the latter had taken possession of and disposed of. The defendant was the executor of one Philip Fosbrooke, and dealt with the goods in question (which were found in the house of the testator) meaning to perform his duty as executor. It appears that the aunt of the plaintiff had lived with the testator as his housekeeper for many years, and that the plaintiff had at a very early age been invited to stay with her aunt, at first as a visitor, but ultimately she became almost adopted into the family. In 1863, the plaintiff's aunt died, but the plaintiff remained in the house on the same footing as before. The plaintiff's claim embraced many articles of female dress and jewellery which she alleged to have become her property during the lifetime of the testator. The great contest at the trial was, whether the property therein passed to the plaintiff or not. As to some of the articles, the jury found that it did not pass: but, as to a class, the value of which was assessed at 25*l.*, the jury found that they had been given to the plaintiff by her aunt and the property in them transferred to her in the aunt's lifetime. It being a rule of law that personal chattels cannot pass by parol gift, without actual transfer of the possession, a contest arose as to whether or not these articles were actually transferred by the aunt to the niece. The jury found that they had been. It was, however, objected on behalf of the defendant,—and the objection was sanctioned by the Judge,—that Susan Philips, the aunt, was at the time she made the alleged gifts a married woman, and that the articles *were the property of the husband, and consequently that the gift of the aunt operated nought, for that the husband might at any time come and take them. I think my Brother Channell was right in saying that such is the law [*525

(*a*) And see Morgan *v.* Knight, 15 C. B. N. S. 669 (E. C. L. R. vol. 109).

of England. I abstain from saying anything as to the authority of the wife to give away articles of this sort, which had been received by her as gifts after she had been deserted by her husband. It will be time enough to deal with that question whenever it shall come properly before us. But I am inclined to think that the plaintiff did not derive any property in the articles in question *as against the husband of her aunt.* If the husband had come and claimed the goods, I think the plaintiff could not have relied upon the gift by the wife as an answer to such claim. But I am clearly of opinion that she may maintain this action against the present defendant, because the rule of law is, that a person who is in lawful and quiet possession of an article has a right to recover its value if a wrongdoer comes and takes it away. A person who takes away and disposes of an article with the authority of the owner cannot be a wrongdoer: but one who does so without any colour of title or authority is a wrongdoer, and is liable to an action at the suit of the party whose possession is so invaded. So is the law laid down in the well-known case of Armory v. Delamirie (1 Stra. 505), commented on in 1 Smith's Leading Cases, 5th edit. 301, where the plaintiff, a chimney-sweeper's boy, having found a jewel, carried it to the shop of the defendant, a goldsmith, to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence; the master offered the boy the money, who refused to take it, and demanded to
*526] have the thing again; whereupon the apprentice *delivered him back the socket without the stones; and, in trover against the master, it was ruled by the Court "that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." The same familiar principle is illustrated by the case put by Mr. *Markby.* It seems to me, that the plaintiff, who was a schoolgirl, going backwards and forwards to the house of the testator, and receiving these things as presents, and leaving them at what might be considered her home during her temporary absences, was in legal intendment in possession of them all the time. "Possession" is a word of ambiguous meaning. In most instances, it is considered to import the manual custody of the chattel; though a man may also be said to be in possession of an article which he has not at the moment about his person. It appears that these things which the jury have found to belong to the plaintiff were from time to time given to her by her aunt, and were placed by her, some in boxes which she left when she went to school in the house in which she had almost been adopted as one of the family, and others were handed by her to the testator to keep for her, and by him placed in a drawer for safe custody. They were therefore in her possession by the hands of the testator: and the place of deposit was as much under her control as the circumstances would admit of. As far as the real rights of the parties are concerned, the articles were as much in the plaintiff's possession as were the goods in the case of Fyson v. Chambers, 9 M. & W. 460:† and the defendant, having taken and sold them, believing them to be the property of his testator, and intending to do his duty, is nevertheless liable for the

wrongful conversion. We should *probably have felt some difficulty in coming to this conclusion, if the husband of Susan Philips had come forward and claimed these goods from the defendant. In that case, possibly, he might have sheltered himself under the husband's title. But, considering the language used by the testator when the husband first asserted a claim, however mistaken he might be as to his legal rights, the terms upon which he was holding the goods were perfectly apparent. Under these circumstances, I feel bound to come to the conclusion that the defendant cannot set up the husband's title, and that the plaintiff is entitled as against him to recover the value of the goods as ascertained by the finding of the jury. [*527

KEATING, J.—I am of the same opinion. If the defendant had been in a position to avail himself of the title of the husband, he would probably have had a good answer to this action. That is the only opinion which was expressed by the learned Baron at the trial. But the defendant is not in a position to do that, because his testator repudiated the husband's claim when urged by him. The defendant must, therefore, rely on the absence of title in the plaintiff. The jury have found, that as to the articles now in question, the possession was transferred by Susan Philips to her niece. The legal title to them, therefore, was in the plaintiff; and there was nothing to show that the defendant had obtained a possession which can prevail against that. It is unnecessary to say more than that I entirely concur with my Lord in thinking that the plaintiff is entitled to succeed to the extent of the 25*l.* which the jury found to be the value of the goods wrongfully taken by the defendant.

MONTAGUE SMITH, J.—I am of the same opinion. It *is clear that the defendant had no right to these goods. Neither he nor his testator had any title to them: and, when the goods were claimed by the husband of Susan Philips, he repudiated his right to them. The only question, therefore, is, whether the plaintiff had a sufficient possession to entitle her to maintain this action. I think it is impossible to say that she had not a title as against every person but the husband. He, however, never interfered. The wife handed the articles to her niece. The latter had a possession which was innocent as against all but the true legal owner. According to the finding of the jury she had absolute possession of them: and nothing has occurred to divest her right. The things were left by her in the house of the testator with his permission, and upon a distinct understanding that they were hers. The case of Buckley *v.* Gross, 32 Law J., Q. B. 129, does not in my opinion at all interfere with the judgment we are pronouncing. "No doubt," says Crompton, J., in that case, "bare possession is sufficient to maintain trover or trespass as against a wrongdoer who takes the article from the person having possession. It does not, however, appear to me that the plaintiff was 'the finder,' within the case of Armory *v.* Delamirie: he rather became possessed of the tallow feloniously or fraudulently (whichever his dealing with it may be called), and he was not a mere innocent finder; but, nevertheless, he would still be able, perhaps, to maintain an action against a person wrongfully taking the tallow from his possession. But, before the defendants dealt with the tallow, the possession of the plaintiff had been divested, and he cannot revert to his previous possession, in order [*528

to maintain the action, unless he had the property. But here the plaintiff had no property, and his possession was lawfully divested, and the tallow was ultimately converted by a person who *does not
*529] claim through a wrongdoer." Here, the plaintiff is a perfectly innocent holder. The only doubt I have entertained has been whether the point was taken, and whether it was open on the leave reserved. But it is clear from what Mr. *Markby* has said, that the attention of the learned Judge was distinctly called to it; and I think we are not precluded by anything that has passed from giving effect to the law. For these reasons, I am clearly of opinion that the plaintiff is entitled to recover to the extent found by the jury.

Rule absolute.

Delivery is essential to the validity of parol gifts *inter vivos:* Hamor *v.* Moore, 8 Ohio N. S. 239; Carpenter *v.* Dodge, 20 Verm. 595; Withers *v.* Weaver, 10 Barr 395; 1 Pars. on Contr. (edit. 1864) 234; 2 Kent's Com. *438. A gift is a contract executed, and delivery of possession is essential to the title: 2 Gr. Cas. 159.

The delivery should be actual, if the subject of the donation admit of such transfer; but if it do not, may be constructive: Bedell *v.* Carl, 6 Tiff. 581; Anderson *v.* Baker, 1 Kelly 595; Noble *v.* Smith, 2 Johns. 52. Gift of growing corn: Grangiac *v.* Arden, 10 Id. 293; Cook *v.* Husted, 12 Id. 188; Woodruff *v.* Cook, 25 Barb. 505; Allen *v.* Cowen, 23 N. Y. 502; Betts *v.* Francis, 1 Vroom 152; Carnadine *v.* Collins, 7 Sm. & M. 432; McWillie *v.* Van Varter, 35 Id. 428; Pope *v.* Randolph, 13 Ala. 214; Wheatley *v.* Abbott, 32 Miss. 343; Blakey *v.* Blakey, 9 Ala. 391; Ivey *v.* Owens, 28 Id. 641. And there must be an absolute parting with the possession: Penfield *v.* Thayer, 2 E. D. Smith 305; Scott *v.* Simes, 10 Bosw. 314; Cooper *v.* Burr, 45 Barb. 9. Mere declarations of intention to deliver are insufficient to prove a gift (Wheatley *v.* Abbott, *supra;* Huntington *v.* Gilmor, 14 Barb. 246; Hunter *v.* Hunter, 19 Id. 631; 2 Kent's Com. *438), especially where the acts of the owner are inconsistent with his having parted with possession of and control over the property (Wheatley *v.* Abbott, *supra;* Collins *v.* Collins, *infra*), or a promise to give (Frost *v.* Frost, 33 Verm. 639), or words of transfer *in præsenti* or *futuro* in writing, not under seal, and without delivery (Davis *v.* Boyd, 6 Jones (Law) 249; Kidder *v.* Kidder, 33 P. S. R. 268; Thompson *v.* Thompson, 2 How. (Miss.) 745). [See as to the necessity of delivery when the gift is made by *specialty*, 2 Kent's Com. *438, Chitty on Contracts 51, McEwen *v.* Frost, 1 Sneed 186; McWillie *v.* Van Varter, Carnadine *v.* Collins, *supra;* Marshall *v.* Fulham, 4 How. 216; Newell *v.* Newell, 34 Miss. 385. It would seem, according to Chancellor Kent, that even in this case delivery will not be dispensed with.] It is not necessary that the delivery should be precisely simultaneous with the words of donation: Gillespie *v.* Burleson, 28 Ala. 551. The delivery must be followed by acceptance: Reed *v.* Spaulding, 42 N. H. 114; Allen *v.* Cowan, Hunter *v.* Hunter, *supra;* Thouvenin *v.* Rodriguez, 24 Texas 468. In the case of a parol gift of land, the Supreme Court of Pennsylvania declared (Collins *v.* Collins, 2 Grant 117) that to render such donations valid there must be a present intent to give, an actual parting with the right of ownership, and a taking possession in pursuance of the gift.

Choses in action and money pass by endorsement or mere delivery accompanied by words of donation: Donnell *v.* Donnell, 1 Head. 267; Allerton *v.* Lang, 10 Bosw. 362. See on this subject generally Crawford *v.* Puckett, 14 La. Am. 539. Gifts in writing with words "give and bequeath," accompanied by delivery: Conner *v.* Hull, 36 Miss. 424; Anderson *v.* Dunn, 19 Ark. 650; Foulk *v.* Foulk, 23 Texas 653; Overfield *v.* Sutton, 1 Metc. (Ky.) 621.

To gifts *mortis causâ*, delivery, as in the case of gifts *inter vivos*, is equally essential, and it may be made to some one acting for the donee as well as to the donee himself: Cutting *v.* Gilman, *infra*; Wells *v.* Tucker, 3 Binn. 370; 2 Kent's Com. *446; 1 Pars. on Cont. (edit. 1864) 236; 2 Redfield on Wills 302–324; Noble *v.* Smith, Hamor *v.* Moore, Huntington *v.* Gilmore, Reed *v.* Spaulding, *supra*; Craig *v.* Craig, 3 Barb. Ch. 116; Bloomer *v.* Bloomer, 2 Bradf. (N. Y. Sur. R.) 340; Singleton *v.* Colton, 23 Ga. 261; Michener *v.* Dale, 11 H. 59. So also, as in the case of gifts *inter vivos*, such delivery must be actual if the subject be capable of it, or it may be constructive, if incapable manifested by writing: Singleton *v.* Colton, *supra*. See Waring *v.* Edmonds, 11 Md. 424. At least the means must be afforded to the donee of getting possession or enjoyment of the subject of the gift: Cutting *v.* Gilman, 41 N. H. 147. The delivery must be *clearly* established: Kenney *v.* The Pub. Admr., 2 Bradf. (N. Y. Sur. R.) 319. The donee's testimony that it took place is insufficient to prove it, and his possession is not evidence of it, when he has had an opportunity to wrongfully acquire such possession: Kenney *v.* The Pub. Admr., *supra*; Westerlo *v.* De Witt, 35 Barb. 215; Delmotte *v.* Taylor, 1 Redf. (N. Y. Sur. R.) 407. An after-acquired possession by the donee, even with authority from the donor, is not sufficient to establish the fact of delivery: Cutting *v.* Gilman, *supra*.

A bond or sealed note will not pass by delivery without endorsement: Overton *v.* Sawyer, 7 Jones (Law) 6.

See generally on this subject Chase *v.* Redding, 13 Gray 418; McKenzie *v.* Downing, 25 Ga. 669; 2 Kent's Com. *447; 1 Williams on Ex'rs. 689–693; 1 Story's Eq. Jur., § 607 *et seq.*; Brunson *v.* Brunson, Meigs 630.

END OF HILARY TERM.

*530] *MEMORANDUM.

THE following gentlemen, were, in the course of Hilary Vacation, appointed Her Majesty's Counsel learned in the Law:—

Thomas Webster, of Lincoln's Inn.
Clement Milward, of the Middle Temple.
Joseph Brown, of the Middle Temple.
James Redfoord Bulwer, of the Inner Temple.
John Peter De Gex, of Lincoln's Inn.
Joshua Williams, of Lincoln's Inn.
Edward Francis Smith, of Lincoln's Inn.
George Jessel, of Lincoln's Inn.
Sir Thomas Phillips, Knt., of the Inner Temple.
Hardinge, Stanley Giffard, of the Inner Temple.

Benjamin Coulson Robinson, of the Middle Temple, was called to the degree of the Coif. He gave rings with the motto, "Ex sese."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

TWENTY-EIGHTH YEAR OF THE REIGN OF VICTORIA. 1865.

The Judges who usually sat in banco in the present Term, were,—
ERLE, C. J., BYLES, J., KEATING, J.

The Overseers of the Poor of the Parish of SUNDERLAND-NEAR-THE-SEA, Appellants; The Guardians of the SUNDERLAND POOR-LAW UNION, Respondents. *May* 10.

1. In the parish of S. were certain breweries the occupiers of which were respectively possessed, as owners or lessees, of a number of public-houses known as "tied houses," some of which were in the parish of S. and some in other parishes. These public-houses were let to tenants at smaller rents than they would have been let at if they had been free public-houses, the tenants being bound by contracts with the landlords (assumed to be contained in the instrument of demise) to purchase from them all the malt and other liquors consumed in their respective houses,—and so (probably) paying a higher price for their liquors than they would have paid had they been free.

In valuing these breweries and public-houses for the purpose of making the valuation-list under the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, s. 14, the overseers applied to them the same principles of valuation as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act, 6 & 7 W. 4, c. 96.

The union assessment committee (under the Union Assessment Committee Act, 1862), having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such "tied public-houses" attached to each brewery, increased the gross estimated rental and the rateable value of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the "tied public-houses." They, however, made no reduction in the valuation-list in respect of the value of the several "tied public-houses:"—

Held, by Erle, C. J., and Montague Smith, J. (dissentiente Byles, J.), that the union assessment committee had done wrong in so increasing the rateable value of the breweries, such rateable value not being affected by these personal contracts with the tenants of the tied public-houses.

2. Held also, that the "rateable value" of the public-houses was not to be decreased by reason of the burthen cast upon the tenants by their contracts with the brewer landlords.

3. In making out the valuation-list in a parish which has adopted the Small Tenements Rating Act, 13 & 14 Vict. c. 99, the reduction to be made under s. 4 of that Act and s. 3 of the 14 & 15 Vict. c. 39, to the owners of small tenements who are rated instead of the occupiers, should be made, not from the "rateable value" of the hereditaments assessed, but from the rate in the pound to be levied and collected.

IN the matter of an appeal by the overseers of the poor of the parish of Sunderland-near-the-Sea, in the county of Durham, to the
*532] general quarter sessions of *the peace for the said county, holden on the 27th of June, 1864, against the valuation-list of the said parish, delivered by the Sunderland Union Assessment Committee to the said overseers.

This was a special case stated, after notice of appeal given, and by the consent of the parties, and by a Judge's order under the provisions of the 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court.

The notice of appeal was as follows:—

"To the guardians of the Sunderland Union.

"Take notice that we, the undersigned, being the overseers of the parish of Sunderland-near-the-Sea, intend, with the consent of a vestry of the said parish, which has been summoned for the purpose of giving such consent, to appeal to the next general quarter sessions of the peace to be holden in and for the county of Durham, at the city of Durham, against the valuation-list of the said parish of Sunderland-near-the-Sea; and further take notice that the grounds of such our appeal are as follows, that is to say,—

"1. That the rateable hereditaments comprised in the said valuation-list of the said parish of Sunderland-near-the-Sea are valued at sums beyond the rateable value thereof:

"2. That certain rateable hereditaments within the said parish in respect whereof the owners thereof are liable to be assessed and are assessed under the Small Tenements Rating Act, 13 & 14 Vict. c. 99,
*533] *instead of the occupiers thereof, are in the said valuation-list valued at sums beyond the annual rateable value thereof:

"3. That, in the said valuation list, the rateable value of the hereditaments mentioned in the next preceding paragraph is arrived at merely by making deductions from the gross estimated rental thereof for repairs and insurance; whereas, the rateable value thereof ought further to be reduced by deducting therefrom one-fourth (or, in the case of hereditaments compounded for by the owners, one-half,) of the amount thereof, pursuant to the 4th section of the said Small Tenements Rating Act, 13 & 14 Vict. c. 99. Dated, &c.

"GEORGE BARNES,
"EDWARD EVANS,
"R. T. GREENWELL,
"JOHN WALTON.
} Overseers of the said parish of Sunderland-near-the-Sea."

The parish of Sunderland-near-the-Sea is one of the parishes included in the Sunderland poor-law union, the board of guardians of which union have in accordance with the Union Assessment Committee Act

1862, 25 & 26 Vict. c. 103, appointed an assessment committee for the purposes of the Act.

The overseers of the said parish, in pursuance of the said Act, made a list of all the rateable hereditaments in the parish in so much of the form shown in the schedule of the Act 6 & 7 W. 4, c. 96, as set out in the schedule in the Act now reciting, which list was duly deposited for inspection, published, and afterwards transmitted to the committee, as required by the Act. This valuation-list, as so transmitted, and as afterwards confirmed and approved by the committee, was to be referred to as forming part of this case.

The committee, after receiving the valuation-list, *made alterations in the values of certain hereditaments, and then caused the list to be deposited for inspection, as required by the Act, and appointed a day for hearing any objections thereto. The overseers of the poor of the parish of Sunderland gave notice of objection, and appeared before the committee and stated their objection to the alterations: but the committee adhered to their original views, and approved and confirmed the list. [*534

The overseers, having reason to think that the parish was aggrieved by the decision of the committee, and having duly obtained the consent of the vestry, gave the notice of appeal hereinbefore set forth.

Previous to the quarter sessions, the respondents gave notice to respite, which was done; and ultimately an arrangement was entered into, that the questions of law should be settled by a special case for the opinion of this Court.

The first ground of appeal is, that the rateable hereditaments comprised in the valuation-list are valued at sums beyond the rateable value thereof. This ground of appeal has reference to the valuation of certain breweries in the parish; and the facts are as follows:—

In the parish there are five breweries, three of which are occupied by the owners, and the remaining two by lessees. The occupiers of these five breweries are respectively possessed of, as owners, or as lessees are entitled to, a great number of public-houses known as "tied houses," some of which are situate in the parish of Sunderland-near-the-Sea, and some in other different parishes. All these public-houses are let to tenants at smaller rents than they would be let at if they were free public-houses; the tenants being bound to purchase from the brewers all malt and other *liquors which they sell in their public-houses: the brewers thus securing to themselves a certain large trade, and being enabled to charge higher prices for their liquors than they would charge the occupier of a free public-house. [*535

In valuing these breweries and public-houses for the purpose of making the valuation-list, the overseers applied the same principles to the breweries and public-houses as to the other rateable hereditaments in the parish pursuant to the Parochial Assessment Act, 6 & 7 W. 4, c. 96; and, in the case of the breweries, without any regard or reference to the advantages derived by the occupiers from the before-mentioned contracts with the occupiers of the several "tied public-houses;" and, in the case of the said "tied public-houses," without any regard or reference to the smaller rents paid by the occupiers to the brewers, and as if such occupiers were at liberty to purchase their liquors in the open market.

The assessment committee, having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such "tied public-houses" attached to each brewery, increased the gross estimated rental and rateable value of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to be let for, with the advantages attending the contracts with the "tied public-houses."

The following extract from the valuation-list will show the nature of the alteration made by the union assessment committee in the case of one brewery:—

*536] * *Valuation-list for the parish of Sunderland-near-the-Sea, in the county of Durham.*

Name of occupier.	Name of owner.	Description of property.	Name or situation of property.	Gross estimated rental.	Rateable value.
Fenwick & Co.	Fenwick & Co.	Brewery, malting, vaults, warehouses, and offices.	Low Street.	426 0 0 327 0 0	355 0 0 254 0 0

The second line of figures shows the amounts at which the brewery was returned by the overseers; the figures entered above show the increased amounts charged by the union assessment committee.

The committee, however, made no reduction in the valuation-list in respect of the value of the several tied public-houses.

The overseers, in objecting to the increase made in the value of the breweries, insisted that, if the valuation of the breweries was to be increased by reason of the advantages derived from the tied public-houses, the occupiers of the tied public-houses should be valued only in respect of the smaller rents actually paid by them, and at the reduced value of the premises resulting from their obligations to purchase their malt liquors of their landlords, and not at the full annual value of the premises without reference to such obligation.

The committee, however, being of opinion that they were bound by the case of Allison v. Monkwearmouth Shore, 4 Ellis & B. 13 (E. L. R. vol. 82), and the cases therein referred to, refused to alter their decision.

As to the second and third grounds of appeal, the following were the facts:—

In the parish of Sunderland-near-the-Sea, the Small Tenements Rating Act, 13 & 14 Vict. c. 99, was duly adopted in the year 1850, and is still in force.

*537] By s. 4 of this Act, it is enacted, that, whilst such *orders as firstly thereinbefore mentioned is in force, the owner of every

tenement in every parish, the yearly rateable value whereof shall not exceed 6*l.*, shall be assessed to the rates for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at three-fourths of the amount at which such tenement would be liable to be rated in case the Act had not passed.

It is further enacted by the same section, "that, whilst such order as firstly thereinbefore mentioned is in force, if any owner of any one or more of such tenements shall be desirous of paying a rate for one year in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and shall give notice in writing of such his desire to the overseers of the poor and to the surveyor of the highways, as therein mentioned, then and in such case such owner shall be assessed to the rates for the relief of the poor and to the rates for the repair of the highways in respect of such tenements respectively, whether the same be occupied or unoccupied, at a sum not being less than one-half of the amount at which such tenements respectively would be liable to be rated, if occupied, in case this Act had not passed."

In the parish there are upwards of 4000 tenements, the yearly value of each of which does not exceed 6*l.*: and, in making out the valuation-list, the overseers entered the rent of these tenements respectively in the column of the valuation-list headed "gross estimated rental," at the rent at which the said tenements might reasonably be expected to let from year to year, free from all usual tenants' rates and taxes, and from the tithe commutation rent-charge, as required by the 6 & 7 W. 4, c. 96, s. 1, and the Union Assessment Committee Act, 1862, s. 15. From this gross estimated rental, the overseers made the usual deductions for the *average annual cost of repairs and insurance, thus arriving at the sum at which the said tenements would [*538 have been liable to be rated, if the Small Tenements Rating Act had not been adopted. Then, in order to arrive at the reduced amount at which the owners should be assessed, instead of the occupiers, the overseers, in those cases where the owners had not compounded, deducted from such last-mentioned amount (that is, the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not passed) one fourth part thereof, and entered the remainder in the column of the valuation-list headed "Rateable value." In those cases where the owners had compounded, the overseers deducted one-half instead of one-fourth from the amount at which the property would have been liable to be rated if the Small Tenements Rating Act had not been adopted, and entered the remainder in the column headed "Rateable value."

The following case shows the mode adopted by the overseers:—

In the case of a tenement for which the owner did not compound, from the "gross estimated rental" of 6*l.* one-sixth was deducted as the average annual cost of repairs and insurance, leaving the sum of 5*l.* as the "rateable value," under the Parochial Assessment Act. From this sum of 5*l.* was then deducted one-fourth, that is, 1*l.* 5*s.*, leaving the sum of 3*l.* 15*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

In cases where the owner had compounded, from the gross estimated

rental of 6*l.* one sixth was deducted as the average annual cost of repairs and insurance, leaving the sum of 5*l.* as the rateable value
*539] under the Parochial Assessment Act. From this sum *of 5*l.* was deducted half, that is, 2*l.* 10*s.*, leaving the sum of 2*l.* 10*s.* as the reduced amount or "rateable value" on which the owner was rateable under the Small Tenements Rating Act, and on which sum the rate was to be computed.

Upon these principles, the rates for the relief of the poor of the parish have been made ever since the adoption of the Small Tenements Rating Act, in 1850, and by which means the overseers have assessed the owners of the small tenements at the same uniform pound-rate, in common with the rest of the rate-payers.

The overseers contended, that, by the increased valuation made by the committee in respect of the last-mentioned rateable hereditaments the aggregate "rateable value" of the hereditaments within the parish was improperly increased to the extent of 3875*l.*, and that such increase was contrary to the provisions of s. 2 of the 6 & 7 W. 4, c. 96, and to the provisions of ss. 35 and 36 of the Union Assessment Committee Act, 1862.

The committee, being of opinion that the 14th section of the Union Assessment Committee Act, 1862, required the overseers in making out the valuation-list to return the full "annual rateable value" of all the rateable hereditaments within the parish, and that the reduction to be made in favour of the owners rated, instead of occupiers, should be made from the rate in the pound, and not from the rateable value, confirmed and approved the valuation-list accordingly.

The questions of law arising on the above statement, for the opinion of the Court, were,—first, whether, under the special circumstances stated in this case, the breweries in question should be rated in any additional sum beyond their annual rateable value as breweries, for the advantages derived from the custom of those tied public-houses
*540] the occupiers of which are compelled *to purchase their liquors at such breweries; and, if so, whether the public-houses connected with the breweries, but situate in other parishes, should be taken into account in calculating the gross estimated rental and rateable value, as well as those within the parish where the brewery is situate,—secondly, if the said breweries are in the opinion of the Court liable to be assessed in respect of the advantages derived from the said tied public-houses, whether the said tied public-houses are liable to be assessed at a reduced "gross estimated rental" and rateable value, in consideration of being so tied to such breweries,—thirdly, whether the reduction to be made under the statute 13 & 14 Vict. c. 99, s. 4, and the 14 & 15 Vict. c. 39, s. 3, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed, or from the rate in the pound to be levied and collected.

And the Court was solicited, according to the power vested in the Court by the said statute of the 12 & 13 Vict. c. 45, s. 11, to remit the case to the said Court of Quarter Sessions for the said county of Durham with the opinion and judgment of the Court thereon, or to make such order as to this case, and the said appeal and the costs thereof, respectively, as this Court might deem fit,—the said parties

having agreed that a judgment in conformity with the decision of the Court, and for such costs as the Court should adjudge, might be entered, on motion by either party, at the sessions next but one after such decision should have been given, pursuant to the said last-mentioned statute.

Lush, Q. C. (with whom was *Prideaux*), for the appellants.—Two questions arise in this case,—first, what is the effect of the contracts between the brewers and the publicans or beer-shop keepers on the rateable *value of the respective premises?—secondly, what is the effect of the Small Tenements Rating Act, 13 & 14 Vict. c. 99? [*541

1. By the Parochial Assessment Act, 6 & 7 W. 4, c. 96, the rate for the relief of the poor is to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe-commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." It is the *property* and that which belongs to the property that is looked at. A personal contract between the landlord, the proprietor of a brewery, and the tenant, as to the supply of beer, cannot be allowed to increase the rateable value of the one property or diminish the rateable value of the other. Suppose the brewer occupied all the houses himself by means of agents, or secured a monopoly by any other means, would the rateable value be affected thereby? [ERLE, C. J.—Or, suppose A. carries on the business of a brewer, and B., his brother, is a large landed proprietor in the neighbourhood, and it is agreed between them that the latter shall give notice to quit to every tenant on his estate who declines to buy his beer of the former?] The brewery may be in one parish and the public-houses in another; and indeed such is the case with some of these public-houses. [BYLES, J.—Put the case of a brewery in the parish of A., with a well (without which the brewery would be utterly valueless) in the adjoining parish of B.] In the canteen case, The King *v.* Bradford, 4 M. & Selw. 317,(*a*) the rent of the premises was the *aggregate of the two sums of 15*l.* and 510*l.* Lord Ellenborough says: "I cannot look at the reservation in this indenture in any other point of view than as a mode which the parties have chosen of dividing the rent; for, it is in substance but one entire rent payable for the occupation of a real tenement, and for the enjoyment of the advantages belonging to it. From its vicinity to the barracks, it of course would attract to it almost all the custom of that neighbourhood, and this is the incident to the property which renders it valuable. If this could be separated from the value of the tenement, and the rent distributed accordingly, we should henceforth never see [*542

(*a*) There, a canteen in barracks demised to B. by the barrack-board for a year, at a rent of 15*l.* for the canteen and buildings, and also the further sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c., usually sold by sutlers, with power of distress for the aggregate sum, was held to be one entire rent for the canteen; and therefore A. was held to be rateable to the relief of the poor as occupier of the canteen in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.*

a demise of any public-house in which this form of distribution would not be observed: the lessor would let the tenement at the bare rent which it was worth, and the privilege of carrying on the trade at a separate and independent rent. And this would be a receipt for reducing the annual value of the tenement to a mere shadow. But we must judge of things as they really are, and not as they may appear to be; and therefore we are to consider here whether this be not substantially one entire rent in respect of one entire subject, though artificially divided into several payments. Now, it does appear to me that this is as much a profit appurtenant to the tenement arising from its local situation, as was the profit of the weighing (*a*) or carding machine (*b*) to the *543] *tenements there rated. And it has not been improperly likened to the case of a soke-mill, which is let at a higher rent because it has a right to the sole multure of all the corn and grain in the neighbourhood." [BYLES, J.—How do you distinguish this case from Allison *v.* The Churchwardens, &c., of Monkwearmouth Shore, 4 Ellis & B. 13 (E. C. L. R. vol. 82)? There, A., being owner of a brewery, and also of thirty-three public-houses, not all situated in the same township as the brewery, demised to B. the brewery, "together with the goodwill and trade" of the public-houses, for seventeen years, B. "yielding and paying for and in respect of the said brewery" 300*l.*, and "for and in respect of the goodwill and trade" of the public-houses 150*l.* B. occupied the brewery, and, under the contract contained in this lease, was enabled to compel the lessees of the several public-houses to purchase their beer at the brewery; and it would have been a breach of the contract between B. and A. if their custom had been diverted elsewhere. The public-houses, in consequence of this agreement, fetched less rent than they would have done if the occupiers had been free to get their supplies where they would: and the advantage of their compelled custom to the occupier of the brewery was worth 150*l.* a year. On a case reserved, stating the above facts, the question being whether the occupant of the brewery was to be rated to the relief of the poor on the value of the brewery as enhanced by this advantage or not,—it was held by the majority of the Court that he was properly rated on the enhanced value, it being an advantage connected with the occupation which would be taken into calculation by a tenant in estimating the annual rent, and that it was not material that the origin of this advantage was in a personal contract.] If the decision in that case can be supported, it can only be *544] upon the ground that the *tenant paid but one rent for the whole, including the privilege annexed to the premises. He did not make the contracts with the tenants of the public-houses. He took the brewery with the privileges. [BYLES, J.—Would it have made any difference if the occupiers had been tenants from year to year, in which case there would have been a demise each year by him?] In Allison *v.* Monkwearmouth Shore, the stock or profits of trade were in effect rated; whereas it is only the actual value of the *property* which can be taken into consideration. The true principle is that which is laid down by Erle, J., in that case. The question, said that learned Judge, is, "whether the premises are rateable for

(*a*) Rex *v.* St. Nicholas, Gloucester, Cald. 262.
(*b*) Rex *v.* Hogg, Cald. 266, 1 T. R. 721.

the price which the occupier thereof agrees to pay to a contractor for influencing customers to the business carried on thereon. And the answer must be in the negative; for, since the Parochial Assessment Act, 6 & 7 W. 4, c. 96, only hereditaments are rateable, that is, land with its appurtenances; and a contract between the occupier and another person is not a hereditament. It is true that the contractor here, who sells his influence over the customer, happens to be the landlord of the premises, and the contract for the influence is contained in the instrument of demise, and the price to be paid annually for the influence is called rent, and the persons to be influenced are also tenants of the same landlord: but, if a traveller with a good connection, agreeing to sell his influence to a tradesman who hired him, happened to be the landlord of that tradesman, and inserted the sale in the demise of the premises, and called the price of the influence rent, the accidental combination of traveller with that of landlord, and a misnomer in the use of the word rent, would not constitute rateability: nor would the rateability of the premises be affected by the source of his influence over his customers, *whether from the compulsory power of landlord or creditor, or from more friendly ties. Also immaterial as to rateability would be the nature of the trade in respect of which the contract is made. Such a contract would not become land in the case of a brewer, more than in the case of a grocer or other tradesman. The rateability of a soke-mill, for the servitude of multure in the servient district, was supposed to be analogous: but the supposed servitude is, by the hypothesis, a legal appurtenance to the mill, and would pass with it upon a demise or sale of the land with its appurtenances. But, if the mill had no legal privilege, it would be rateable on ordinary principles, and the rateable value would not be altered by any personal contract for custom, or for influence over custom, which the miller for the time being might make with his landlord or any other person: and so of a brewery; if it had a seignory, and the publicans were bound ratione tenuræ to do service by buying beer at the brewery, the profit would be a profit on realty, and rateable; but, if this was obtained by contract or choice, the profit would be personal, and not rateable." Then, as to the tied public-houses, it is manifest, that if they are to be assessed at their full rateable value, without regard to the burthen imposed upon the occupier by the contract with the brewer, the assessment on the breweries ought not to be increased also; otherwise, the same property would be rated twice. [*545

[The Court desired to hear the argument for the respondents upon this point, before proceeding to the other part of the case.]

Liddell, Q. C. (with whom was *Tomlinson*), for the respondents.—The case of Allison *v.* The Churchwardens, &c., of Monkwearmouth Shore, 4 Ellis & B. 13 (E. C. L. R. vol. 82), was rightly decided, and is conclusive on this first *question. Of the five breweries in this case, three are in the hands of the owners; the other two being held by lessees under leases with the tied public-houses annexed to them. They may, however, for the purpose of this argument, be assumed to stand on the same footing. The breweries are more valuable by reason of the assignable interest annexed to their occupation. In estimating the rent which a hypothetical tenant would give, all the [*546

advantages annexed to the occupation would necessarily be taken into consideration. [ERLE, C. J.—The obligation to take all their beer from the landlord's brewery is contract only, not running with the land. Suppose, instead of the publican being the brewer's tenant, the former had lent the latter money, the repayment of which was secured by a bond with a covenant to take from the former all beer, &c., which should be consumed on certain premises,—how would that case differ from this?] The obligation to take beer is an obligation attached to each brewery. [ERLE, C. J.—To the brewer.] The public-houses are said to be attached to the respective breweries, and bound to take all their beer from the brewery to which they are so respectively attached. It is immaterial how the obligation arises: the increased value is the same. Lord Campbell, in Allison *v.* Monkwearmouth Shore, says: "The criterion is, 'the rent at which the premises might reasonably be expected to let from year to year,' with proper deductions. But, in calculating this rent, regard must be had to the pecuniary value of all the advantages which the tenant will have as tenant and occupier of the demised premises, connected with his occupation. In this case, I consider it a fact that the tenant and occupier of the demised premises, in which he is to carry on the trade of a brewer, is entitled to have, and must have, during the term, the entire custom of thirty-three public-houses, *i. e.*

*547] *that the publicans carrying on business in these public-houses, are bound to buy from his brewery the whole of the beer, &c., which is to be consumed by their customers. They are bound to deal at his brewery; and it is only by occupying the demised premises that he is entitled to this advantage. I think that the advantage so to be derived from the occupation of the premises, is to be taken into consideration in estimating the assessable value; because it would be taken into consideration by a tenant in determining the rent which he would be willing to pay. I agree that *influence* in recommending customers is not rateable, and that *profits in trade* cannot be rated as an hereditament: nevertheless, I think that hereditaments are rateable according to the advantages which will be enjoyed from the occupation of them during the period for which the rate is to be imposed. It is admitted that the occupier of a soke-mill would be liable to be rated higher than if there were no one under an obligation to grind corn at his mill and to pay him multure. But it is said this is because the law compels customers to deal with him. In my opinion, it depends upon the obligation alone, and not upon the origin of the obligation. If the owner of a large estate with a grist-mill upon it, were to insert in all his leases a covenant that his tenants shall grind at his mill all the corn grown on their farms, and should let the mill with this certainty of custom, in my opinion the miller would be rateable as if the mill were a soke-mill, because his profits would be as great and as certain; they would arise equally from the occupation of the mill; and the rent which he would be willing to offer would not be in the slightest degree influenced by the consideration that the obligation to deal with him arose from contract, instead

*548] of arising from immemorial usage. If there be a strong **pro bability* of custom coming to a house in which a particular trade is carried on from the local situation of the house, this would be

taken into consideration by the tenant in calculating the rent he would give: and the rent which he agrees to give upon this *probability* would be the basis of the assessment upon him. If the additional rent in respect of *probable* custom is to be taken into consideration, I do not understand how the rent is to be excluded which is given in consideration of the custom which must *certainly* come to him as occupier of the premises assessed." In Staley *v.* The Overseers of Castleton, 33 Law J., M. C. 178, it was held that the occupier of a cotton-mill, which, owing to the scarcity of cotton, was not kept at work, might be liable to be rated to the poor-rate upon the value of the building used as a warehouse for storing the machinery therein. Blackburn, J., there says: "The Parochial Assessment Act lays down the rule by which we must be guided, viz. that the rate is to be made upon an estimate 'of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe-commutation rent-charge, if any, and deducting therefrom the probable *average annual* cost of the repairs,' &c. It is to be therefore such a sum as might *reasonably* be expected, and the *average* annual cost of repairs, &c., is to be deducted. Certainly, as was said by Lord Denman, C. J., in The Queen *v.* Capel, 12 Ad. & E. 382, 412 (E. C. L. R. vol. 40), 4 P. & D. 87, 'the language is very inartificial, and loose to a degree which renders the discovery of a definite meaning to all its parts extremely difficult.' But the question which might be raised as to the relative liabilities of different properties, as relied upon by Mr. Kay, in the proviso to the section, does not attach here. As it appears to us, the hypothetical tenant from year to year would give nothing *for it as a cotton-mill. Mr. Kay says that it is possible, and I may say that I hope it [*549 is probable, that the present state of things will improve, and that a tenant could be found who would be willing to take it for a term on a larger rent, reckoning that that supposition will be realized. But that is not the way the probable rent is to be arrived at. Mr. Kay would change the words of the statute, and, instead of the words to let 'from year to year,' would introduce the words 'for a reasonable term of years.' The result would be, that, if a man was driving a shaft with the expectation of meeting a valuable vein of minerals, he would be rateable upon some probable value for those minerals before he ever reached them, and though he was deriving no benefit whatever from his labour and expense. The law is not so; but the legislature intended that the rate should be made upon the rent which might be reasonably expected from a tenant who took the property from year to year, rebus sic stantibus." So, in The Queen *v.* Williams, 23 Law T. 76, it was held, that, where the tenant of a farm pays an increased rent for the privilege of killing game on the farm, he is liable to be rated for that increased value. Again, in The Queen *v.* The Inhabitants of Thurlstone, 1 Ellis & Ellis 502 (E. C. L. R. vol. 102), 28 Law J., M. C. 106, where a tenant occupied land under a parol demise to trim from year to year, the right to the game and of entering for the purpose of taking and killing it being reserved to the landlord,—it was held that the tenant was only rateable for the value of the land without the shooting. "As the reservation," said Wightman, J., "lessens the value of the tenant's occupation by the value of

that which is so reserved, the effect is, that what is reserved is separated from the beneficial occupation of the tenant, and that he is therefore rateable only in respect of such beneficial occupation; that is, in the present case, an *occupation as pasture land only." And
*550] Crompton, J., said: "Here, what the tenant took by the demise itself was, only the land, as pasture land, without the right of shooting; and therefore he is rateable only in respect of his occupation of the land as pasture land." That is precisely applicable here: the hypothetical tenant would not give so much for the farm in the one case, or for the brewery in the other, without the privilege by which its value was enhanced. The same principle will apply to the tied public-houses. The tenant would not give so much for the house as he would if it had been free from the obligation imposed by the brewer's contract.

Lush, Q. C., was heard in reply.

ERLE, C. J.—This question is one of great importance and some difficulty. We will therefore take time for deliberation.

Lush, Q. C.—The next question arises upon the Small Tenements Rating Act, 13 & 14 Vict. c. 99, and is whether the reduction to be made under the 4th section of that Act and the 3d section of the 14 & 15 Vict. c. 39, to the owners of small tenements who are rated instead of the occupiers, should be made from the rateable value of the hereditaments assessed, or from the rate in the pound to be levied and collected. It is submitted that the former is the true construction of the statutes. By the 1st section of the 13 & 14 Vic. c. 99, the vestry of any parish are empowered from time to time to declare and order that the *owners* of tenements in such parish the yearly rateable value whereof shall not exceed 6*l.*, shall be rated and assessed to the rates for the relief of the poor in respect of such tenements, instead of the
*551] *occupiers* *thereof. The 2d section provides for the rescinding of the order: and s. 3 enacts, that, whilst any such order as firstly thereinbefore mentioned is in force, the respective owners of such tenements shall be rated and assessed (instead of the occupiers thereof) to the rates for the relief of the poor and to the rates for the repairs of the highways, which otherwise such occupiers might by law be rated to. Then comes the 4th section, which enacts, that, "whilst such order as firstly hereinbefore mentioned is in force, the owner of every tenement in every parish the yearly rateable value whereof shall not exceed 6*l.*, shall be assessed to the rates for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at *three-fourths* of the amount at which such tenement would be liable to be rated in case this Act had not passed; and further, that, whilst such order as firstly hereinbefore mentioned is in force, if any owner of one or more such tenements shall be desirous of paying a rate *for one year* in respect of all such tenements in any parish, whether such tenements be occupied or unoccupied, and shall give notice in writing of such his desire to the overseers of the poor and the surveyors of the highways within fourteen days next after the 25th of March in that year, then and in such case such owner shall be assessed to the rates for the relief of the poor, and to the rates for the repair of the highways, in respect of such tenement r tenements respectively, whether the same be occupied or unoccu-

pied, from thenceforth till the 25th day of March following, at a sum not being less than *one-half* of the amount at which such tenement or tenements respectively would be liable to be rated, if occupied, in case this Act had not passed." It is the "rateable value" that is to be reduced,—to three-fourths in the one *case and one-half in the other,—and not, as the union assessment committee assume, the rate. The 3d section of the 14 & 15 Vict. c. 39 extends that provision to borough-rates. The importance of the question is, that the mode adopted by the union assessment committee will materially increase the contribution of this parish to the common fund of the union. [BYLES, J.—The parish has the option of coming under the operation of the Small Tenements Act or not.] Every one knows the difficulty of collecting rates from the occupiers of small tenements. In Easton *v.* Alce, 7 Hurlst. & N. 452,† words much less strong than the words here were held to be referable to "rateable value." The 1 W. 4, c. cxxxv., s. 2, provided that, amongst others, "twelve inhabitant householders resident in the town or parish of Rye, *rated to the relief or maintenance of the poor of the said parish by one or more rate or rates to the amount of* 10*l. per annum*," should be appointed commissioners of the harbour of Rye: and it was held that *the rateable annual value*, and not the rates payable, conferred the qualification. "If," said Pollock, C. B., in the course of the argument, "the Act meant what is contended for on the part of the plaintiff,"—that the party must be rated to the relief of the poor in such an amount as rendered him liable to pay 10*l.* a year,—"it would stand alone among the Acts relating to qualification by rating." The Union Assessment Committee Act, 1862, in ss. 35 and 36, carefully provides that all these rights shall remain unaltered. Section 35 enacts, that "nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same, in such manner as they were by any statute or statutes enabled to do before the passing of this Act:" and s. 36 enacts that "nothing herein contained shall extend or be taken to render liable to be rated any *property, or any person in respect of any occupation not now by law rateable, of any property, or to deprive any property, or the occupier of any property, of the benefit of any exemption, in whole or in part, to which such property or occupier is now by law entitled, from any poor-rate or other rate which by law is required to be based upon the poor-rate, or to render liable to be rated according to the annual rateable value thereof, any property which under any local Act or otherwise is entitled to be rated upon a fixed amount, or according to any special or exceptional principle of valuation, whether such property shall or shall not be included in any valuation-list in force under this Act."

[*552

[*553

Liddell, Q. C., contrà.—This question turns on the way in which the Parochial Assessment Act is dealt with by the Union Assessment Committee Act, 1862. The object of the last-mentioned Act is declared by the preamble to be, the "securing uniform and correct valuations of parishes in the unions of England." The earlier sections of the Act relate to the appointment of the assessment committees, and defines their duties and their authority. By s. 13 the committee may require the overseers, &c., to make returns to them of all such particulars as they may direct in relation to any taxes, rates,

or valuations, or any property included therein. By s. 14 the overseers of each parish in the union are to make a list of all the rateable hereditaments in such parish, with the annual valuation thereof respectively, in the form in the schedule annexed to the Act. The last two columns of this schedule are to contain the "gross estimated rental" and the "rateable value." The 15th section contains a definition of what those rentals are. It enacts that "the gross estimated rental for the purpose of the schedule to this Act shall be, the rent at
*554] which the hereditament might *reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any: Provided that nothing herein contained shall repeal or interfere with the provisions contained in the 1st section of the 6 & 7 W. 4, c. 96, defining the *net annual value* of the hereditaments to be rated,"—that is, the rent at which the same might reasonably be expected to be let from year to year, free of all the usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. The 16th section empowers the committee to extend the time for the return of the valuation-lists, to direct the valuation-lists to be revised, to appoint with consent of the board of guardians a person to value property in the parish, and to make and sign the valuation-list to be delivered to the overseers. By s. 17 the valuation-lists are to be deposited for inspection, and afterwards transmitted to the committee. The 18th section enacts that "any overseer or overseers of any parish in any union who shall have reason to think that such parish is aggrieved by the valuation-list in any parish within such union, or any person who may feel himself aggrieved by any valuation-list, on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof: and, where the ground of any objec-
*555] tion shall be unfairness or incorrectness in the *valuation of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, also give notice in writing of such objection, and of the ground thereof, to such other person." Section 19 requires the committee to hold meetings for hearing objections: and section 20 enables the committee to alter and correct the valuation-list, and, with the consent of the guardians, to appoint a valuer to enable them to do so, and requires them to approve of the valuation-list when corrected. The 24th section declares that "every valuation-list approved by the committee and delivered to the overseers of the parish to which the same relates, shall, with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation-lists so approved and delivered, be the valuation-list in force in such parish,"—except in parishes governed by local Acts. The 25th section enacts, that "when and so often as any property

not included in the valuation-list in force in any parish becomes rateable, or where, by reason of any alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments, and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value since the valuation thereof, whether by building, destruction of building, or other alteration in the condition thereof, or otherwise, the overseers of the parish in each of the cases aforesaid shall, as soon as conveniently may be, make a supplemental valuation-list showing the *annual rateable value*, according to the judgment of the overseers, of the property so become rateable, or of the parts so become liable to be rated separately, or of the *property so increased or reduced in value, as the case may be." By s. 26 the committee are empowered from time [*556 to time, on the application of any person aggrieved, or on their own judgment, to order a new valuation-list, to be made in substitution of the whole, or a partial one as a supplemental list. The 28th section enacts, that, in every parish where a valuation-list under this Act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which by law is required to be based upon the poor-rate, shall be of any force, unless the hereditaments included in such rate, except as hereinafter provided, be rated according to the *annual rateable value* thereof appearing in the valuation-list in force in such parish." It is the actual annual rateable value that is to be looked at, and nothing else. The 30th section is important: it enacts, that, "when the assessment committee for any union shall have approved valuation-lists for all the parishes comprised within such union, the guardian of such union in computing the amount of contribution to the common fund for the several parishes, shall thenceforward take the annual rateable value of the property in such parishes respectively from the valuation-lists for the time being lastly approved of for such parishes respectively." The only reservation of the Small Tenements Rating Act is in s. 35: the 36th section does not apply to it at all. Upon s. 35, Mr. Lumley, in the 2d edition of his pamphlet on the Union Assessment Committee Act, 1862, at p. 42, n. (*g*), says,—"This is a clause of extreme caution, as the Act applies only to the valuation of property, and in no respect interferes with the liability of the parties to be rated for that property. The general statutes referred to, are, the 59 G. 3, c. 12, s. 19, and the 13 & 14 Vict. c. 99; but there are numerous local Acts in parishes which provide for [*557 the rating of the owners in the *place of the occupiers. Those Acts do not, however, prevent the committee from obtaining valuations of the rateable value in such parishes. The intention of the Legislature was, to extend the area, and to secure equality and uniformity in the contributions of the different parishes to the union charges: and this intention would be frustrated if the argument of the appellants in this case were to prevail. And there is no hardship in adopting this construction. The parish accepts the Small Tenements Rating Act for its own convenience.

Lush, Q. C., in reply.—The Union Assessment Committee Act, 1862, was intended merely to secure the due execution of the Acts

already in force, and uniformity in the valuation of rateable property, not to alter or affect the rights or liabilities either of parishes or individuals. The principle of contribution had already been laid down. The 24 & 25 Vict. c. 55, s. 9, reciting that it was expedient to alter the mode in which the contributions of parishes to the common fund of the union in which they are comprised are now calculated, enacts, that, "after the 25th of March then next, the several parishes comprised in any union formed or thereafter to be formed under the provisions of the 4 & 5 W. 4, c. 76, shall contribute to the common fund thereof, in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements, and hereditaments shall be actually rated or not, and whether the rate levied shall be collected in full or upon any composition." And s. 10 enacts that "the guardians of every such union, in computing the amount of contribu-
*558] tion to the common fund from *the several parishes, shall take the annual rateable value of such property in every parish therein from the valuation upon which such parish was assessed to the county rate, or, where there is no county rate, to the borough or ward rate, or other rate in the nature of a county rate, in the last assessment made not less than one month next preceding the day when the order for such contribution is made." The 4th section of the Small Tenements Rating Act refers to the value put upon the tenement, not to the amount of the rate: the owner is to be "assessed to the rates for the relief of the poor, and to the rates for the repairs of the highways, in respect of such tenement, at three-fourths (or one-half, as the case may be) of the amount at which such tenement would be liable *to be rated* in case this Act had not passed." The 35th section of the Union Assessment Committee Act, 1862, standing alone, would not have met all the cases intended to be provided for; the enactment in s. 36 was therefore necessary. The 43d and 44th sections are not unimportant. The former enacts, that, "in every parish, until a valuation-list has been approved, and delivered to the overseers under this Act, every rate made for the relief of the poor in such parish shall be made in the form and contain the particulars required by the 6 & 7 W. 4, c. 96; and, after such valuation-list has been so approved and delivered, every such rate (except in any parish where the poor-rate or the assessment for the same is made under the provisions of a local Act as aforesaid) shall show the annual rateable value of each hereditament comprised therein, according to the valuation-list in force in such parish:" and the latter that "all the powers, authorities, provisions, clauses, and regulations now in force relating to the assessments(a) collection, and levying of poor-
*559] rate (save so *far as the same are hereby repealed or altered) shall be good, valid, and effectual for the purpose of assessing,

(a) The statutes here referred to, 3 & 4 W. 4, c. 30, 6 & 7 Vict. c. 36, 16 & 17 Vict. c. 97, s. 35, 17 & 18 Vict. c. 104, s. 430, c. 105, s. 2, 18 & 19 Vict. c. 128, and 3 & 4 Vict. c. 89, continued by successive statutes to the present time, are all general Acts which exempt property either wholly or partially from assessment to the poor-rate. See Lumley, 48 (a).

levying, collecting, and enforcing the payment of such rate, and for carrying this Act into execution."(a)

ERLE, C. J.—Upon the point last argued, I am of opinion that our judgment should be for the respondents. At the first reading of the statute, the inclination of my opinion was the other way, conceiving that there was a hardship in the construction contended for by Mr. *Liddell*. Upon consideration, however, I think that it is not so. But, whether there be or be not any hardship, we are bound to give judgment according to the true effect of the language of the legislature as we understand it. Now, the legislature has required valuation-lists to be made out for every parish, for the purpose of acquiring uniform and correct information as to the value of all the rateable property in the different parishes. The question is, whether the seventh column of the list, the form of which is given in the schedule to the 25 & 26 Vict. c. 103, and which is headed "Rateable value," is to show the rateable value truly, or whether, in a parish which has adopted the Small Tenements Rating Act, the rateable value of the small tenements is to be set down in that column at the proportion which the owner is to pay upon under the 13 & 14 Vict. c. 99, s. 4, viz. *three-fourths or one-half, as the case may be. Giving effect to the words of [*560 the statute according to their plain literal meaning, I am of opinion that the true rateable value of the premises is to be inserted. It means rateable value simpliciter. All through the Act, as pointed out by Mr. *Liddell*, until we come to section 35, each successive enactment seems carefully framed to indicate that there shall be one uniform survey and valuation of all the rateable hereditaments in the parish, and that the result of such survey and valuation shall appear upon the face of the valuation-list. I was much struck with the argument, that it is to be such a uniform correct valuation as a surveyor valuing the premises would arrive at upon viewing them and looking at the locality and the circumstances in which they stand; and that, if the rateable value of the small tenements is to be ascertained upon the principle contended for by the appellants (the overseers), such rateable value would not be that which the surveyor would arrive at upon a survey of the property as it stands, but upon a survey of the property coupled with an inquiry as to whether or not the owner had compounded with the parish, and whether he was to be assessed at three-fourths or one-half of the annual value: so that the entry in the column headed "rateable value" would be subject to two accidental circumstances, and also to the further accidental circumstance that the parish, which had at one time adopted the Small Tenements Rating Act, might, by giving notice under the 13 & 14 Vict. c. 99, s. 2, return to the original state of things. Showing, therefore, the sum to be paid by the owner during the time the parish had adopted the Small Tenements Rating Act, would not show the rateable value when the parish had ceased to adopt it. Thus construing the Act according to its plain literal meaning, the whole tenor of the

(a) Upon this Mr. Lumley observes (p. 48 *b*),—"When the provisions of this Act are considered, it will be seen that they only seek to effect the correct and accurate valuation of property for the poor-rate, and that none of the powers above referred to are required for carrying this Act into execution."

*561] *provisions directing these valuation-lists to be made is clear to command, without limitation or exception of any kind that I can see, that the rateable value of all the hereditaments in the parish is to be ascertained according to the well-known principles of the Parochial Assessment Act, 6 & 7 W. 4, c. 96, entirely independent of the Small Tenements Rating Act. I will presently refer to these Acts, in confirmation of that opinion. The contention on the part of the appellants is, that, under the 35th section of the Union Assessment Committee Act, the owners of small tenements have a right to compound as heretofore, and that under s. 36 all payments are to be made as heretofore. Mr. *Lush* says that those sections would be wholly inoperative if the owner could not compound. But I give those sections their full operation, and hold that the owner has a right to compound as heretofore, and that when he does compound he is to pay the smaller sum: and, though the contribution of the parish to the common fund of the union would depend upon the amount that is set down in the seventh column, headed "rateable value," yet the sums collected in the parish would not be in the same proportion to the rateable values where the Small Tenements Rating Act had been adopted. I do not think there is any real hardship in that. The case put by Mr. *Liddell* has convinced me. Suppose two parishes adjoining one another, each having exactly the same quantity of rateable property, and the same proportion of small tenements, and one of them has adopted the Small Tenements Rating Act, and the other has not: in that case, it is agreed on all hands that the parish which has not adopted the Small Tenements Rating Act should have the small tenements put down at their actual value in the "rateable value" column. In that case, according to the experience I acquired

*562] when *counsel for a parish which contained a large number of poor inhabitants, the sum collected in the two parishes would be exactly the same. It is entirely impossible for the collectors to get the true amount from the small tenements, even after seizure and sale of everything the occupiers possess. The operation of s. 35 of the Union Assessment Committee Act, and of the Small Tenements Rating Act, together, applies to the collectability of the rate,—to create a convenient mode by which the rate can be collected. But the property in the parish which is subject to be rated, the gross estimated rental, and the rateable value, all those remain the same. But, in respect of the collectability of the rate, if the parish has adopted the Small Tenements Rating Act, the owner assures to the parish three-fourths or half the amount, as the case may be. The Parochial Assessment Act confirms me in this view; for, the schedule to the Union Assessment Committee Act contains the same first seven columns that are contained in the schedule to the Parochial Assessment Act,—"Name of occupier," "Name of owner," "Description of property," "Name or situation of property," "Estimated extent," "Gross estimated rental," and "Rateable value," but not the last, "Rate at 6*d.* in the pound." I think the application of the privilege given by the Small Tenements Rating Act is to be confined entirely to the eighth column, which is called "rate:" and, in the case of an owner who has compounded, the sum put down would be one-half the amount inserted for other premises of the same rateable

value the owner of which had not compounded. Thus, to use the schedule to the Parochial Assessment Act as an example, set down "Rate at 6*d.* in the pound," 1*l.* 7*s.* 6*d.*, add against a compounding owner's name, "owner having compounded," then, instead of 1*l.* 7*s.* 2*d.* as the rate or sum to be collected, it would be 13*s.* 9*d.* *Upon a careful examination of the Union Assessment Committee Act, and referring to the Small Tenements Rating Act, [*563 and reading those Acts together with the Parochial Assessment Act, it seems to me to be clear that the legislature intended that the "rateable value" in the valuation-list should be the true actual rateable value capable of being ascertained by a surveyor from the essential permanent qualities of the rateable subject, not depending on the accidental circumstance of an arrangement made between the owners and the parochial authorities for the more convenient collection of the amount to be paid by them in respect of the premises. Upon this point, therefore, the appellants fail.

BYLES, J.—I am of the same opinion, though I must confess, that, until I had heard Mr. *Liddell*, I thought otherwise. I now, however, entirely agree with my Lord. It must not be forgotten, in considering these cases, that the tax is imposed, not on the land, but on the person occupying the land; for, the statute of Elizabeth says that the money to be raised for the relief of the poor in every parish is to be raised "by taxation of every inhabitant, parson, vicar, and other occupier:" and so early as the case of Theed *v.* Starkey, 8 Mod. 314, it was decided that poor-rates are personal charges, not charges on the land, and therefore a covenant to pay taxes on the land does not extend to poor-rates. That being so, it seems to me that the words in the 13 & 14 Vict. c. 99, s. 4, may well be read as referring to the person, and not to the property. That section enacts, that, whilst the order declaring that the owners of the small tenements shall be rated and assessed to the rates for the relief of the poor in respect of such tenements shall be in force, "the owner of every tenement in every parish the yearly rateable *value whereof shall not exceed 6*l.* [*564 shall be assessed to the relief of the poor, &c., in respect of such tenement, at three-fourths of the amount at which such tenement would be liable to be rated in case that Act had not passed,"—or at one-half, if the owner elects to take the chance of the premises being occupied during the whole year. I admit that some slight violence will be done to the language of the Act by this construction, and that, instead of the word "at," we must read "according to," or "in proportion to." But that must be so; for, if the rate were made on any other principle, the rateable value would appear to be of one-third or one-half less value than it really is. At the end of every rate I observe there is the following declaration by the overseers and churchwardens: "We ——— do declare the several particulars specified in the respective columns of the above rate to be true and correct, so far as we have been able to ascertain them, to which end we have used our best endeavours." Now, the effect of Mr. *Lush's* construction would be, that the overseers and churchwardens would be making a declaration which they knew to be false; whereas, if you read the word "rate," in the 4th section of the 13 & 14 Vict. c. 99, to mean what was really intended, viz., a charge on the person in respect

of the land, then they put their hands to nothing which was not strictly correct and true. The gross estimated rental is put down, the rateable value is put down, and the rate upon the person, as pointed out by my Lord, is also put down. I am inclined to think, that, even before the passing of the Union Assessment Committee Act, 1862, the proper mode of proceeding was, to put down the gross estimated rental, the true rateable value, and the amount of the rate charged upon the person of the occupier. But, however that may be, the
*565] Union Assessment Committee Act is imperative with regard *to that which is the subject of this appeal, viz., the valuation-lists. They are to be lists "of all the rateable hereditaments in such parish, with the annual value thereof respectively;" that is, they are to be true valuation-lists. And they are to be made by persons who can have no knowledge of any circumstances which may render the annual value of the premises more or less than upon an ordinary survey they would appear to be. This is an appeal, not against the rate but against the valuation-list. It appears to me that it would have been incorrect if it had been in any other form than it is. If the construction we put on the former Act be the correct one, I do not know that there was any occasion for the enactment contained in the 35th section of the Union Assessment Committee Act. If there was, it applies to this case. The words are,—"Nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same" [that is, "assessed in respect of the same"], "in such manner as they were by any statute or statutes enabled to do before the passing of this Act." Upon these grounds, therefore, I conceive that what has been done here has been rightly done. I lay very great stress on the fact that, if it were otherwise, first, on the original rate, then on the valuation-list, and afterwards on the rate made upon the valuation-list, we should be adopting a construction which would make the declaration of the overseers and churchwardens incorrect upon the face of it. The suggestion of hardship was disposed of by the answer given by the learned counsel for the respondents: and I will add nothing to what my Lord has said upon that subject.

MONTAGUE SMITH, J.—I am entirely of the same opinion. The
*566] intention of the Union Assessment *Committee Act was, to ascertain and fix the full rateable value of all the rateable hereditaments in every parish; and I think it never was contemplated by the Legislature that the rateable value to be inserted in the valuation-lists was to be affected by the accident of whether or not the Small Tenements Rating Act had been adopted in any parish, and the further contingency of the owners of the small tenements having elected to compound. I agree with what has fallen from the rest of the Court, that the proper form of rate under the Parochial Assessment Act and the Small Tenements Rating Act would have been, to have taken the form given in the former Act, leaving all the columns unaltered except the last, in which the amount of the rate is mentioned. If that be so, there is really no difficulty whatever in the construction of the Union Assessment Committee Act. But, even if that be not the true construction of the Small Tenements Rating Act, and the rate should have been made in the form suggested by Mr.

Lush, I think the intention of the Legislature is so clearly and plainly expressed in the last statute, that there can be no room left for giving a different construction. It leaves untouched the liability of particular occupiers or owners in individual parishes; and it expressly enacts, in s. 30, that, "when the assessment committee for any union shall have approved valuation-lists for all the parishes comprised within such union, the guardians of such union, in computing the amount of contribution to the common fund for the several parishes, shall thenceforward take the annual rateable value of the property in such parishes respectively from the valuation-lists for the time being lastly approved of for such parishes respectively, any statute to the contrary notwithstanding." For the purpose of contribution those lists are made up. Then come the saving clauses, ss. 35, 36, which *were introduced for the purpose of preventing any injustice being done between the parishioners of individual parishes [*567 inter se. The 35th section supports the construction which the Court is inclined to put on the mode in which the rate ought to have been made even before the 25 & 26 Vict. c. 103. It says "nothing herein contained shall be construed to prevent the owners of tenements from compounding for the rates to be assessed on the same, in such manner as they were by any statute or statutes enabled to do before the passing of this Act,"—clearly treating it as a composition on the rate, and not as an alteration in the rateable value. The framers of the Act evidently did not suppose that the column "rateable value" would be interfered with in cases where there was a simple composition for the rate. The case of Easton *v.* Alce, 7 Hurlst. & N. 452,† does not at all interfere with our present decision. The case turned upon the construction of a clause in an Act of Parliament which gave a qualification to local commissioners. The Court thought the language somewhat doubtful: but, upon the whole, they came to the conclusion that the words "twelve inhabitant householders rated to the relief or maintenance of the poor to the amount of 10*l.* per annum," were satisfied if the persons elected to be commissioners occupied property the rateable value of which was assessed at 10*l.* That was a decision really in favour of the qualification. Channell, B., in giving judgment, says: "A reasonable construction ought to be put upon the Act." And Wilde, B., says: "I also think a reasonable construction ought to be put upon the Act. A strict construction might favour the plaintiff's view: but, giving the Act a reasonable construction, the defendant is entitled to judgment." Here, we are dealing with Acts of Parliament passed for a totally different purpose: and the only question for us is, whether this *valuation-list is right or wrong. The language of the Act is so express and plain that [*568 I think we can give no other effect to it than by holding that the assessment committee have taken the right view, and that the true rateable value ought to be inserted.

The Court being divided in opinion as to the first point argued, and upon which they took time for deliberation, their opinions thereon were now delivered seriatim, as follows: (*a*)—

(*a*) The ancient practice was,—and it is seldom departed from even in modern times,—for the junior puisne Judge to deliver his opinion first, and the Chief Justice's opinion to come last.

ERLE, C. J.—The question relating to the rateable value of the small tenements was answered at the time of the argument.

The questions relating to the rateable value, first, of the breweries, and, secondly, of the tied public-houses, are now to be disposed of.

The case relates to five breweries and a number of public-houses tied to each brewery, some being in the same parish with the brewery to which they are tied, and some in a different parish. It seems from the case that all the breweries are rated on some principle known to the assessment committee, without referring to the title-deeds and leases. For the purpose of this judgment, I will take the case as if it related to one brewery in one parish, and one public-house tied thereto by a contract for beer in another parish: and then the facts relevant to the question before us are, that the occupier of the public-house holds it under a lease from the occupier of the brewery; that in the lease he contracts to take beer from his landlord's brewery; and that the rent to be paid for the public-house is adjusted by refer-
*569] ence to this contract. Thus, *a loss is caused to the tenant in respect of the beer he buys, that is, he pays more for it than he would have to pay if he traded free from such contract. A gain also is caused to the landlord's brewery, for the same reason.

The case does not state that the gain to the brewery is greater, or less than, or equal to, the loss of the public-house; but as nothing is stated to the contrary, I assume it to be equal.

Thus, the rent in money to be paid and received respectively, is less than it would be if the house was free, by the amount of such respective loss and gain; but the value that passes between the landlord brewer selling beer on the one side, and the tenant publican buying beer on the other side, is the same as it would be if the house was free.

The overseers making out the valuation-lists for these parishes, and setting down the rateable value of this brewery and of this public-house, among the others, have obeyed literally the commands of the Union Assessment Act and the Parochial Assessment Act, that is, they have estimated the gross rent which each of those tenements would be worth to a free occupier, and, in making that estimate, they have excluded from their attention, as they were bound to do, any reference to special profits of trade by reason of special contracts in leases or otherwise.

The assessment committee, in revising these valuation-lists, have made an alteration, by increasing the estimate of the gross rent which the brewery could command. They do not state on what principle they have made this increase, or on what evidence they have acted; but they have raised the rateable value from 254*l.* to 355*l.* in the example set out in the case, being nearly the ratio of increase which
*570] was approved of in the case of Allison *v.* Monkwearmouth Shore, *4 Ellis & B. 13. It is further stated, that, although they have followed that case in raising the rateable value of the brewery on account of the tie, they have not lowered the rateable value of the public-house by the amount of the loss caused by the tie, probably because the judgment in Allison's case does not refer thereto.

We are thus called upon to decide between the overseers and the assessment committee: and in my opinion the overseers are right.

In support of that opinion, I would premise some observations before examining the application of the case of Allison *v.* Monkwearmouth Shore, on which the assessment committee rely. I would premise that the Union Assessment Act now under consideration has a purpose ulterior to that of the Parochial Assessment Act, which alone was under consideration in Allison *v.* Monkwearmouth Shore. The purpose of the Parochial Assessment Act, is to provide for equality in the rating of each of the rateable subjects in one parish. The purpose of the Union Assessment Act is to provide for equality in the rating of each aggregate of rateable values in each of the parishes of the union. This latter purpose is to be effected by applying with correct uniformity throughout every parish of the union the principles for estimating value as required by the Parochial Assessment Act. The valuation-lists are made a permanent standard of value, whereby to assess all the rateable subjects within the union, both to the parochial and to the union assessments, until an alteration shall have been made; and, although a mode of alteration is provided, yet, considering the expense and difficulty of a survey of the rateable property in a union, an alteration will not be easily made. It is therefore commanded by those statutes, as I understand them, that the estimate of the rental should be *confined to corporeal hereditaments, and should be founded on the more permanent elements of value [*571 found therein, excluding the effect of temporary contracts and other such accidents.

I would further premise, that, as the case is stated, there is no ground for assuming that the aggregate value of the two tenements does not continue the same, whether they are held separately or jointly, there being no statement of any increase of value by reason of any combination. Then, if the brewery gains by the tie what the public-house loses thereby, and no more, the aggregate amount of the rateable values of the two tenements ought to be the same, whether they are rated together or separately, whether they are held under the same or under different landlords.

Under these circumstances, the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public-house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the respondents did not offer to maintain it. By that admission, the question to be answered is narrowed to the point whether the whole rateable value of the public-house shall be set down in the list for the parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied.

That question may be raised in respect of four changes of the relation between the respective occupiers of the brewery and of the public-house.

First, I would take the case where the owner of both is the occupier of both,—the brewer carrying on the public-house by a servant. Here there is no lease and no tie, and each rateable subject would be rated in the parish where situated, upon the ordinary principle, and the contingent possibility of a tie, in case *there should be a lease of each, would be immaterial. The value thus ascertained [*572 is the true rateable value for the list.

Secondly, I would take the case where the owner of both tenements occupies the brewhouse, worth say 200*l.* per annum, and lets the public-house to a publican, say at 20*l.* per annum, without any contract relating to beer. The house would be free, and the rateable values would be the same as in the last case, unaffected by a tie.

Thirdly, I would take the case where the owner of both tenements occupies the brewery, and lets the public-house with the tie, that is, with the contract for taking beer; the money rent being lowered, say, to 10*l.*, and the beer overcharged, say to the same amount. In this case also it seems to me that the rateable value of each remains the same, and would be rated in the parish where situate.

Fourthly, I take the case where the owner of both tenements makes a lease of each, first letting the public-house, assumed to be worth 20*l.*, for 10*l.* moneyed rent, with a contract for taking beer, which is worth 10*l.* gain to the brewer, and then letting the brewery with the benefit of that contract, the brewery by itself being worth 200*l.* per annum, the benefit of the tie being worth 10*l.* per annum. Thus, the rent for the brewery with the contract is 210*l.* per annum. Under these circumstances also it seems to me that each tenement should be rated, in the place where it is situate, at the rent which it would command if let by itself without the tie, and that a decision that the rateable value in this fourth case is different from that of the former cases, would in effect hold that the rateable value depends on the actual occupation, not on the estimated rental, which is contrary to the Assessment Acts, as I understand them.

*573] *Moreover, if the rateable value is altered by the tie, the overseers making the rate ought to know whether it exists. Its existence depends on the title-deeds and leases of the brewer and publican. If the overseers are to rate for the tie, it seems to follow that they ought to inspect and understand those documents of title; and this consequence seems to me absurd.

The assessment committee do not refer to any such source of knowledge. Perhaps they have increased the rate on every brewery to a large amount, assuming that the tie exists, and they expect the brewer to produce his deeds, to relieve himself if that assumption be wrong. But such a principle of rating cannot be sanctioned by any Court at Westminster.

I now proceed to the case of Allison *v.* Monkwearmouth Shore. The facts of that case seem to me to be materially different from those here stated; and the statute here to be construed is different from the statute there in question, and therefore it is not necessary to decide whether an opinion given by a Court by way of advice, from which there is no appeal, is as binding on co-ordinate Courts as a judgment would be, where the same question is sent up to a second Court for its opinion. I should think not. It seems to me that each Court is in such case original, and bound to give its own judgment; just as, on a motion for a writ of habeas corpus [or a prohibition] each tribunal must give its own decision, without being swayed by other tribunals. But, as already observed, it may be that we are not called on here to say that any former case should be overruled.

In Allison *v.* Monkwearmouth Shore, the title-deeds and leases were produced by the brewer, and the facts relevant to the rating of

the brewery for the supposed profit from the tie were taken therefrom. Those facts were, that Sir Marmaduke Williamson was owner of a *brewery of which the rateable value by itself was 350*l.*, and thirty-three public-houses, of which the rateable value is not given. These public-houses he had let, with the contracts to take beer, at moneyed rents, amounting in the aggregate to 150*l.* He then leased to Allison for seventeen years the brewery, with the good-will of these public-houses, as it is called, subject to the payment of the rents theretofore received by Williamson, that is, yielding in respect of the brewery and fixtures, 350*l.*, and *in respect of the public-houses* 150*l.* This sum of 150*l.* thus described as rent is found to have been in substance the rents of the public-houses collected by Allison for Williamson during the existing leases. When the tenancies changed, Allison let to the new tenants, and continued to receive during the term the same moneyed rent from those public-houses, amounting to about the sum of 150*l.* per annum, which he paid to Williamson under the above-mentioned covenant. The lease of the good-will of the public-houses is thus shown by the case to have been in effect a lease of the public-houses. The Court held that Allison was liable to be rated for this sum of 150*l.*, being the amount of rents so received. The case also finds that all the tenants were assessed for their public-houses; but the value is not stated. These being the facts, the judgment affirming the rate on the brewer for the amounts of rents collected by him and paid over to the superior landlord, has the singular effect of holding that a rent-collector may be rateable for the amount of rents which he collects, where the given relation of brewer and publican is found to exist. [*574

The case is also singular in this, that, although, as a general rule, the province of the Courts here is confined to deciding on rateability only, and does not extend to deciding on amount, yet the Court, in thus holding the brewer liable to be rated for *the rents collected, refused to give permission to go into the question of the cost of the production of the supposed rateable value of 150*l.*, and assumed that the covenant to pay that sum as rent of the brewhouse was conclusive of rateable value, although the deed showed it was rent collected. The case also found that Mr. Allison rented other public-houses not of a brewer landlord, which he sub-let to publicans with the contract for beer. The notion of rating him for the rent he received from these publicans seems not to have been attempted: but, if he was liable for those he rented of Williamson, it is difficult to say why he was not liable for those rented of others. If the attempt had been made to rate him for every public-house under contract with him to take beer, it would have been the rating of a profit of trade; and yet the profit from beer to Williamson's public-houses was the same profit of trade as that from other public-houses. [*575

Furthermore, there is sound distinction between that case and the present, on the ground that the valuation-lists relate to the whole union, and all the tenements are at once to be assessed. Under the former Acts before the Union Assessment Act, there was a defect in deciding appeals on rates, because only one tenement was the subject of the judgment at a time, and, in apportioning the rateable value of two or more portions of the same rateable subject in two or more

parishes, the injustice of doubly rating the same rateable subject might be inflicted in the apportioning process, unless all the portions were disposed of at once. Accordingly, in Allison's Case, although it appeared that the tenants of the public-houses were rated, as well as the tenant of the brewery, yet the Court had no power of inquiring, and did not inquire, whether the public-houses were rated at their full value, and whether the rating of Allison for the rents
*576] *which they paid to him was not in reality a double rating of the rent of these public-houses, that is, once on the tenant, and again on Allison.

Here, the overseers have rated all the public-houses, as well as the brewery, according to the principles of the Assessment Acts; and, according to those principles, the publican would have to pay a rate both on the lower money payment and higher beer charge which he pays to the brewer, his landlord, under the contract.

There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made, it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency and otherwise; and so it would be made apparent that it was an attempt to rate a profit of trade.

If the doctrine is established, that the supposed profit from a publican tenant taking beer by contract is rateable upon the brewer, the question would arise why the same profit arising by reason of a publican debtor contracting to take beer from the brewer creditor should not be also assessed. The tie is created as well by a loan secured by a bill of sale as by a covenant in a lease, that is, unless the publican can pay off the loan, he may be broken up, as it is called, at any time; and yet the attempt to make such a profit of trade rateable has not been made. It is also clear that a brewer differs not in respect of this liability from a butcher, a baker, or the like. If the brewer landlord is to be rated as Allison was, other tradesmen landlords influencing custom by letting retail tenements with contracts for custom, ought to be rated: but such an item of rateable value has never been recognised.

*577] For these reasons, the case of Allison v. *Monkwearmouth Shore seems to me distinguishable from the present. In the judgment delivered by me in that case, I endeavoured to distinguish the right of the occupier of a soke-mill derived from immemorial custom to the servitude of all within the soke, and the right of the occupier of a canteen placed in a populous locality, from a right derived under such a contract as that in Allison's Case. I refer to the reasons there given, which appear to me to have more force when applied to a valuation-list fixing the rateable value of each rateable subject in the union on the principles above explained; and I will not increase the length of this judgment by repeating what I am reported there to have said.

I will only add, as to the soke-mill, that the prescriptive rights of the miller of that mill to the multure from the inhabitants of the soke, is a realty affecting the fee simple of the whole locality, and the immediate profit fixed by the custom is subject to no risk of trade, if the miller may take his toll in kind; whereas, the right of the land-

lord to sue on the contract for taking beer, is a personalty, affecting only the persons of the contracting parties; and the profit therefrom varies, in proportion to the skill of the contracting parties, and is subject to all the risks of trade from insolvency, dishonesty, and the like. If this be correct, the profit to the mill from the prescription is rateable, and the profit to the brewer from the contract for beer is not.

Upon this review, I come to the conclusion that the judgment should be for the appellants.

BYLES, J.—In this case, no question arises as to the aggregate rateable value of the whole brewery concern, including in that expression both the brewery, properly so called, and the restricted public-houses. The *question is, how that rateable value should be distributed between the brewery itself and those restricted houses. [*578

It has been decided by the Court of Queen's Bench in Allison *v.* Monkwearmouth Shore, 4 Ellis & B. 13 (E. C. L. R. vol. 82) (by which decision I think we are bound), that the monopoly which a brewery enjoys over its tributory public-houses enhances the rateable value of the brewery. It is a necessary consequence that it diminishes the rateable value of the public-houses. It doubly affects, or may affect, their annual value to the occupiers, who not only pay more for their beer, but, being shut out from the benefit of buying in the open market, may be obliged to purchase an inferior article, and to suffer a diminution of the extent of their trade, as well as of their rate of profit. These public-houses do in consequence actually let at a lower rent than they would otherwise command.

It is objected that a mere personal contract cannot diminish the rateable value of land or houses. But the statute 6 & 7 W. 4, c. 96, establishes as the criterion of rateable value the rent (subject to the deductions there enumerated) which a tenant, not for a long term of years, but *from year to year*, would give.

The statute does not, it is true, make the actual rent reserved the criterion of rateable value, but the true theoretical rent, that is to say, the sum at which, making the statutable deductions, and having regard to all the surrounding circumstances, the tenement ought to command. Yet, the statute, by adopting a supposed tenancy from year to year, seems to exclude a valuation of distant future advantages or disadvantages of the property demised, and to regard its actual condition at the time of the rate, or, at furthest, in the immediate future.

Now, if the natural or ordinary advantages of a *tenement are taken away from it, and annexed to another tenement, that should seem to be a diminution of the value of the first tenement, and an augmentation of the value of the second. It seems to me that it makes no difference whether the severance arise from modern contract, or from prescription, which presupposes an ancient contract. [*579

In this case, the ordinary advantages of the tenement are by a permanent contract between landlord and tenant taken away from the tenant's tenement and annexed to the landlord's tenement.

If it be said that the surrender of these ordinary advantages by the tenant to the landlord is in effect *rent* paid by the tenant to the land-

lord, I should respectfully answer that it is straining the word "rent" as used in the statute, to give it this extensive signification. Moreover, there are cases much nearer to a reservation of rent-service to the landlord than the case now under consideration, in which cases nevertheless the reservation of valuable privileges to the landlord on the one hand, or the enjoyment of them by the tenant on the other, have been held respectively to diminish or augment the rateable value of the tenant's occupation. Thus, it has been decided, that, if the landlord allows to the tenant the right of shooting, the tenant will be rated at more, but, if the landlord reserves it to himself, the tenant will be rated at less: The Queen *v.* Thurlstone, 28 Law J., M. C. 106. Some ornamental squares in the metropolis must by mere private contracts for a long term of years be used as squares; and no one would hire them subject to those contracts. Their rateable value, though in itself very great for many purposes, is taken away by contract: and by contract it is transferred to the adjoining property, for it is included and rated in the increased value which the ornamental
*580] square confers on the *mansions that surround it. A house in Cheapside, let as a shop, for which it is adapted by situation and construction, would command a large rent: but, if it be subjected by the ground-landlord to a stipulation that it shall be used as a dwelling-house only, and not as a shop, its rateable value in the occupation of a tenant is reduced by the effect of a contract.

It is no objection that a portion of the value of the land may in some cases escape the rate altogether; for, the statute of Elizabeth imposes the rate, not on the *land*, but on the *person* of the occupying tenant, in respect of his ability, as tested by the annual value of the land: for, originally, an inhabitant and occupier was rated for personal property as well as real property: and it has been repeatedly held that the poor-rate is no charge upon the land: Theed *v.* Starkie, 8 Mod. 314. Nor is there much danger of abuse; for, in ordinary cases, that method of letting which will produce most rent will be preferred by the landlord.

It is true that pecuniary charges on the land created by contract, as, ground-rent, rent-charges, annuities, interest of mortgages, and the like, are not to be deducted from the rateable value of a tenement: but that is because the legal criterion of rateable value is, by the provision of the statute, the rent which a tenant from year to year would give for the land in its actual condition, subject to certain deductions, among which are tithes, rates, taxes, insurance, repairs, &c., but among which deductions pecuniary charges created by contract are not to be found.

But, in truth, the statute of 6 & 7 W. 4, though not in form declaratory, made very little alteration in the principles of rating before accepted by Courts of law.

*581] For these reasons,—differing with respect and *reluctance from the judgment of the Lord Chief Justice and my Brother Montague Smith,—I think the assessment committee were right in their decision.

MONTAGUE SMITH, J.—I agree with my Lord that the judgment on the first and second questions of this special case should be for the appellants. These questions in substance are,—whether the rateable

value of a brewery to be inserted in a valuation-list, under the Union Assessment Act, 1862, is to be increased beyond the ordinary rateable value of the like property, and the rateable value of certain public-houses is to be reduced, because the owner of both has made a contract with his tenants of the public-houses that they shall buy all their beer of him as brewer, at a price beyond the fair market-price of the beer.

It is contended by the counsel for the respondents, that the rateable value of the brewery should be increased, and as a consequence (which he admits) that the rateable value of the public-houses should be reduced by reason of these contracts; and this although the properties may happen to lie in different parishes.

It appears to me that this contention is not well founded, and that the contracts between the brewer and the publicans do not form a basis for either raising or diminishing the gross or net rateable value as defined by the statutes, for the purpose of the valuation-list under the recent Act.

In estimating the rateable value, or "the rent at which these properties might reasonably be expected to let from year to year," the value of the tenements as they stand and are fitted up, the use to which they may be applied, their local position, and other like circumstances, are to be considered. In the case of the brewery, the capacity of the building and premises for *carrying on trade, and also the [*582
fact that a trade corresponding to its capacity would primâ facie be carried on in it, would be proper elements to include in the estimate, subject, however, in the case of the latter element, to modification if it were shown, as in the case of the idle cotton-mill (Staley *v.* The Overseers of Castleton, 33 Law J., M. C. 178), that the trade was not in fact carried on. But these contracts, if considered, would introduce personal and collateral matters into the estimate, not directly bearing on the occupation of the property and the uses to which it is applied. The contracts here are really modes by which the owner of the two properties chooses for the time, not to alter the nature or uses of the occupation of the properties, but to apportion and regulate his own rents and profits.

Assume that the owner and occupier of the brewery derives increased profit as a brewer from the contract, there is on the other hand a corresponding loss to him as owner of the public-houses: and, if this profit so purchased is held to add to the rateable value of the brewery, it would follow that that value must be reduced below the ordinary rateable value of the like property, in case the brewer chose to foster his public-houses at the expense of his trade as brewer by contracts to sell beer to his tenants at a loss. It seems to me that such grounds of raising and depressing rateable value are not warranted by the statutes.

The difficulty of importing such contracts into the estimate of rateable value is still more apparent when we are called on to reduce the rateable value of the public-houses below that of other like houses. I am unable to find a sound principle for such a reduction.

The public-houses are occupied, their capacity for trade exists, and a trade is actually carried on in them. These things afford [*583
the ordinary elements for *estimating rateable value: but

neither the particular rent a tenant pays, nor the particular profits or losses of his individual trade depending on provident or improvident contracts in relation thereto, can, I apprehend, be imported. It may be assumed here that the profits of the publican's trade are cut down by the contract, with the consequence, as found in the case, that the publican pays less rent: but rateable value is not altered by the actual rent being more or less than the rent the premises would reasonably command from a yearly tenant. Rent is no more than presumptive evidence of value: and, this being so, I think the rateable value of the public-houses remains unaffected, although the actual rent may be below what, without the contract in question, the house would let for. If it were to be held otherwise, and the contract of the publican happened to be so onerous in its terms that no new tenant would give more than a nominal rent for the public-house burthened with a like contract, it would follow from the argument of the respondents that the house must be rated at a nominal value only. But, in truth, in the case of these public-houses, the publicans are really paying a part of their rent in the extra price they are charged for the beer, and clearly the shape in which they pay cannot alter the rateable value of the house.

The facts of the case of Allison *v.* Monkwearmouth Shore, 4 Ellis & B. 13 (E. C. L. R. vol. 82), differ in some respects from the present; and the question of reducing the rateable value of the public-houses was not in that case before the Court for decision. Here, we have to decide that question, and to decide it upon the provisions of the recent statute. Notwithstanding the respect which I feel for the opinion of the two learned Judges who formed the majority of the Court, their
*584] decision, which *could not be appealed from, ought not I think to be conclusive in this case.

On the first and second questions of this special case, I think the appellants are entitled to judgment.

Judgment for the appellants.

BILBEE *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *May* 9.

1. *Quære*, as to the extent of the obligation of a railway company to place guards at level crossings?

2. A railway crossed on a level a public carriage and foot way at a spot which, from the fact of there being a considerable curve in the line, and a bridge near, trains coming in one direction were not seen until very close, was peculiarly dangerous. There were gates across the carriageway which were kept locked; but the footway was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff while using the footway was knocked down by a passing train, and injured:—Held, that it was properly left to the jury to say whether or not the Company had been guilty of negligence.

THIS was an action against the London, Brighton, and South Coast Railway Company, for negligence.

The first count of the declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, the defendants were the proprietors of a railroad which crossed a highway

for carts and carriages on a level, yet that the defendants did not employ any guard or proper person or persons, or any person whatever, to open and shut the gates next to the said highway, so that persons passing along the said highway should not be exposed to danger or damage by the passing of carriages and engines along the said railroad, nor did they take due or proper care of the said crossing or for the protection of persons using the same, but therein wholly failed and made default, contrary to the form of the statutes in such case made: by means of which premises, and of the neglect and default of the defendants in that behalf, the plaintiff, who was then lawfully using the *said highway where the said railroad crossed the same, was knocked down by an engine and [*585 carriages passing along the said railroad, and his arm was broken, and he was otherwise bruised, wounded, and injured, and became and was sick, and so continued for a long time, and was put to expense, and disabled from earning his living as a brickmaker, or otherwise, and was and is otherwise injured.

The second count stated, that, before and at the time of committing the grievances thereinafter mentioned, the defendants were possessed of a locomotive engine and train of carriages, which were then under the care, management, and direction of certain servants of the defendants, who were then driving the same across a highway; nevertheless, the defendants, by their said servants, so carelessly, negligently, and improperly drove, governed, and directed their said engine and carriages, that, by and through the mere carelessness, negligence, and improper conduct of the defendants by their said servants in that behalf, the said engine and carriages of the defendants ran against and struck the plaintiff, who was then lawfully in and upon the said highway, and knocked him down, and bruised, wounded, and injured him; by means of which premises he became maimed, sick, and disordered, and disabled from earning his living as a brickmaker or otherwise, and was put to expense, and otherwise injured: Claim, 500*l.*

The defendants pleaded not guilty, whereupon issue was joined.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term, when the following facts were given in evidence:—On the morning of the 11th of July last, the defendant, a labourer, was passing a level crossing about half a mile from the Thornton Heath station on the Croydon and Belham branch [*586 *of the defendants' railway, when he was knocked down by the 9.40 express train from Victoria station to Brighton, and had one of his arms broken, and received other injuries which rendered him unable to work for several weeks. The road in question is an accommodation road for the use of such persons as might occupy the houses then in the course of building thereon. There was a carriageway with gates on each side of the railway which were kept locked, and were opened only when carts or other vehicles were passing through: and there was also a footpath with a swing-gate at each side for the accommodation of foot passengers, which was not fastened. The plaintiff had resided for some time in the immediate neighbourhood.

On the part of the plaintiff it was proved that there was considerable traffic on this part of the railway; that there was no person in

charge of the gates at the crossing in question, and no caution board; and that, there being a sharp curve in the line, and a bridge on the Victoria side a short distance off, a person crossing could not see a train approaching from that side until he was actually upon the rails.

On the part of the defendants, witnesses were called who stated that an approaching train could be seen on the Thornton Heath side at a distance of about four or five hundred yards, and on the Croydon side about seven or eight hundred yards: and it was further proved that there are numerous foot and carriage ways crossing the Company's line at various parts on a level, with gates like those at the crossing in question; and that, by reason of the great expense that would thereby be entailed upon the Company, it was not the practice to station persons to guard them; nor was it usual to do so on other railways.

For the plaintiff it was insisted that the Company was bound to keep some person at all level crossings, *to prevent injury to the public lawfully using them: and reliance was placed on the 2 & 3 Vict. c. 45, s. 1, which, after reciting the 5 & 6 W. 4, c. 50, s. 71, enacts, "that, wherever a railroad crosses or shall hereafter cross any turnpike-road, or any highway or statute-labour road for carts or carriages, the proprietors or directors of the Company of proprietors of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings, and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike-road or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad."

*587]

For the defendants it was insisted that there was no duty imposed upon the Company by the common law to guard these crossings, and no statutory obligation save that created by the 47th section of the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which requires the Company to have a person in charge of the gates, where "the railway crosses a *turnpike-road* or *public carriage-road* on a level,"—a provision which, it was submitted, did not apply to a road like this. It was further contended that the plaintiff had by his own negligence and want of caution materially contributed to the accident.

The learned Judge intimated an opinion that there was no obligation on a railway Company to have a person in charge of the gates where the level crossing is for the use of foot passengers only, the statute being confined to public carriageways: and he left it to the jury to say whether or not the Company had been guilty of negligence.

The jury returned a verdict for the plaintiff, damages 60*l*.

*588]

**Bovill*, Q. C., on a former day in this term, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, on the grounds that, upon the facts proved, the plaintiff did not establish his case, and that there was no evidence of any neglect of duty or default by the defendants, that there was no statutable or other duty to keep a man at the foot-crossing, and that the accident arose from the plaintiff's own deafness and want of caution.(*a*)

(*a*) This latter would only be ground for a new trial as for a verdict against evidence.

Parry, Serjt., and *Joyce* now showed cause. The question is, whether there was any evidence of negligence on the part of the Company, or whether they were guilty of the breach of any duty imposed upon them by any statute or by the common law. [ERLE, C. J.—I thought that there was no such obligation on the Company as suggested where the railway crossed a footway only, but only where it crossed a carriageway.] The plaintiff lawfully using the way in question,—which was proved to be a public way for carriages, horses, and foot-passengers,—was entitled to complain if it was kept in a dangerous condition. Scott *v.* The London Dock Company, 34 Law J., Exch. 17, is precisely in point. There, the plaintiff, a custom-house officer, was injured while on the defendants' premises in the course of his duty, by goods falling on him from a crane fixed over a doorway under which he was passing: no explanation was given of the cause of the goods falling: and it was held by Channell, B., and Pigott, B.,—following Byrne *v.* Boadle, 2 Hurlst. & Colt. 722,†—that it was for the defendants to show that the accident was not the result of negligence on their part, and not for the plaintiff to make out that it was; Martin, B., *holding the contrary, upon the authority of Hammack *v.* White, 11 C. B. N. S. 588, 594. [*589 The special Act, no doubt, empowered the defendants to lay down their rails in the manner they did: but that does not exonerate them from the duty of guarding against unnecessary inconvenience and danger to the public. Some means should be taken, either by keeping the gates locked or placing a person to warn the public when a train is coming: and this was more especially requisite at the spot in question, which was proved by the witnesses to be, from the construction of the line, and the obstructions upon it, more than commonly dangerous. A swing-gate like this, which a child might push open, was no protection at all. The statutory duty imposed upon railway Companies by the 2 & 3 Vict. c. 45 is not repealed by the 8 & 9 Vict. c. 20. The 47th section of the last-mentioned Act,(*a*) it is true, in terms applies *to "any turnpike-road or public carriage-road;" but a carriageway includes a footway, and foot-passengers are entitled to the same protection. [*590 [ERLE, C. J.—We cannot lay it down as a general rule that a railway Company must in all cases have a gate or a porter at every part of their line where a foot-way is crossed on a level.] In Fawcett *v.* The York and North Midland Railway Company, 16 Q. B. 610, the facts were these:—The York and North Midland Railway crossed a highway on a level, and there were gates across each end of the road where it intersected the line of railway: the plaintiff's horses strayed from his field into the highway, through the gates (which were open) on to the railway, and were in consequence there killed by a train: and it was held that by the

(*a*) Which enacts, that, "if the railway cross any turnpike-road or public carriage-road on a level, the company shall erect and at all times maintain good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway: and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts,

statute 5 & 6 Vict. c. 55, s. 9,(a) an obligation was imposed on the Company to keep the gates closed as well against cattle straying on the highway as against cattle travelling thereon,(b) and that the plaintiff was entitled to recover the value of the horses. In Marfell v. The South Wales Railway Company, 8 C. B. N. S. 525, the defendants were the owners of a railway and also of a tramway which for some distance ran by the side of the railway, and was separated from it by a hedge or fence, also belonging to the defendants, down to a point where the tramway crossed the railway. At this point the Company
*591] had placed swing-gates to separate *the tramway from the railway; but these were seldom, if ever, closed. The tramway was used by the public for drawing coals and other goods in trucks along it by means of horses, a toll being paid to the defendants for its use. The plaintiff's servant was proceeding along the tramway with certain horses and trucks, when one of the horses, alarmed by the noise of an approaching train, swerved on to the railway, and was knocked down and killed. In an action against the Company, charging them with negligence in omitting to use reasonable or proper means to prevent their engines and carriages doing damage or injury to persons lawfully being upon and using the tramway,—the jury having found (as here) that the Company were guilty of negligence,—it was held by Williams, J., and Byles, J. (Erle, C. J., dissenting) that the plaintiff was entitled to recover. It is impossible to distinguish that case from the present.

Bovill, Q. C., and *Hannen*, in support of the rule.—It is scarcely possible to exaggerate the importance of this question to railway Companies. The Legislature having conferred upon them the right to cross turnpike-roads and highways on a level, the public must know that the use of the way is thereby rendered more dangerous, and consequently that it is necessary where the privilege is exercised to use greater caution in crossing the line. No notice could have given this plaintiff, who resided in the immediate neighbourhood, and was constantly passing and repassing to and from his work across the line, more information than he already possessed. As far as concerns a footway, there can be no obligation or duty nor any power in the Company to place an obstruction in the way. They may obstruct carriageways by proper gates, but not footways. To
*592] require the Company to keep a man at *every place where the railway crosses a footpath, would be onerous in the extreme, and utterly impracticable. Assuming that the 2 & 3 Vict. c. 45 and 5 & 6 Vict. c. 55, s. 9, are not repealed by the 8 & 9 Vict. c. 20, s. 47, they relate only to highways for carts and carriages. There was no

or carriages shall have passed through the same, under a penalty of 40*s.* for every default therein: Provided always that it shall be lawful for the Board of Trade in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over any such road should be kept closed across the railway, to order that such gates shall be kept so closed, instead of across the road, and in such case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the railway shall have occasion to cross such road, in the same manner and under the like penalty as above directed with respect to the gates being kept closed across the road."

(*a*) Which recites the 2 & 3 Vict. c. 45, and which is substantially re-enacted by the 8 & 9 Vict. c. 20, s. 47.

(*b*) And see The Midland Railway Company, app., Daykin,, resp., 17 C. B. 126.

common-law duty and no statutory obligation on the Company to do any more than they have done. And the plaintiff himself was clearly negligent. The case in this respect very much resembles that of Cotton *v.* Wood, 8 C. B. N. S. 568 (E. C. L. R. vol. 98), where, in an action for alleged negligence in driving an omnibus, it was held that the Judge was not justified in leaving the case to the jury, when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

ERLE, C. J.—I am of opinion that this rule should be discharged. I am fully impressed with the duty of the Courts not to impose upon railway Companies burthens larger than the Legislature has intended that they should bear: and I do not mean to lay it down as a rule that they are bound to place guards wherever a footway crosses the line on a level, or to interfere in any way with any statutory duties or obligations of railway Companies. The ground upon which I decide in favour of the plaintiff on this occasion, is, that the great degree of risk incurred by persons exercising their public rights on this particular spot, owing to the large number of trains passing daily, the sharpness of the curve, and the obstruction of the view caused thereby and by the adjacent bridge, should have induced the Company to exercise more vigilance. Under all the circumstances, I am unable to say that the Judge was bound to nonsuit the plaintiff.

BYLES, J.—I entirely agree with my Lord in *thinking [*598 that this rule should be discharged,—confining myself, as my Lord has done, to the peculiar circumstances of the present case.

KEATING, J.—I also think that the peculiar danger of the spot in question called for the exercise of greater caution on the part of the company than was shown.

MONTAGUE SMITH, J.—The frequency of the trains and the other circumstances referred to called for more vigilance than the Company seem to have exercised. Rule discharged.

LYNE *v.* WYATT. *April* 26.

The defendant, to an action against him as the acceptor of certain bills of exchange, pleaded a composition-deed under s. 192 of the Bankruptcy Act, 1861, by which, reciting that he was indebted *to his creditors* in divers sums of money, and particularly to *the parties of the third part* in the several sums set opposite to their names in the schedule, and, being unable to pay them all in full, had agreed to execute an assignment, he conveyed all his estate and effects to trustees in trust for distribution amongst *all his creditors*. Then came a covenant by *the parties of the third part* not to sue the debtor, and that, if any of them should do so, the debtor should be and he was thereby "acquitted, exonerated, and for ever discharged of and from all actions, suits, *debts, and demands* whatsoever, of the creditor by whom he should be so sued, and those presents might be pleaded in bar thereto as effectually as a release under the hands and seals of the creditors might or could be:"—

Held, that, if this clause by force of the Bankruptcy Act applied to non-assenting creditors, it was unreasonable, and, if it did not, there was no release by them, and therefore, in either view, it could not be pleaded in bar to an action by a non-assenting creditor.

THIS was an action by the plaintiff, the endorsee, against the defendant, as the acceptor of several bills of exchange, for 270*l.*, 280*l.*, 450*l.*, and 200*l.* respectively; with a count upon an account stated.

The defendant pleaded,—thirdly, that, after the accruing of the said

causes of action in the declaration mentioned, and after the 11th of October, 1861, and after the commencement of this suit, and before
*594] the *plaintiff declared therein, the defendant, being a debtor unable to meet his engagements, within the meaning of the Bankruptcy Act, 1861, a deed was made and entered into between the defendant of the first part, and certain parties, trustees, therein mentioned, of the second part, and certain creditors of the defendant of the third part, relating to the defendant's debts and liabilities, and his release therefrom, the same being a deed executed by the trustees, and by certain creditors of the defendant, and by the defendant, being such debtor, within the true intent and meaning of the Bankruptcy Act, 1861, and which said deed, without the schedule thereunder written, was in the words and figures following, that is to say,—"This indenture made the 29th of February, 1864, between George Wyatt, of, &c., builder (hereinafter styled debtor), of the first part, Thomas Parker, of, &c., William Hancock, of, &c., and Charles Richardson, of, &c. (hereinafter styled trustees), of the second part, and *the several other persons whose names and seals are hereunto subscribed and affixed in the schedule hereunder written*, being creditors of the said debtor in their own right solely, or in copartnership with others, of the third part: Whereas, the said debtor is indebted unto his creditors in divers sums of money, and particularly unto the said several parties hereto of the third part in the several sums of money set opposite their respective names; and, being unable to pay all his creditors in full, he has agreed to execute the assignment hereinafter contained: Now, this indenture witnesseth, that, in consideration of the sum of 5*s.*, &c., he the said debtor doth hereby grant, bargain, sell, convey, assign, transfer, and set over to the said trustees, their heirs, executors, administrators, and assigns, all the freehold and leasehold estates wheresoever, and all and every the stock in trade, wares,
*595] merchandise, *fixtures, household and other goods, chattels of every description, sum and sums of money, debts due and owing, ready moneys, and securities for money, books, papers, writings, and all other the real and personal estate and effects whatsoever and wheresoever of him the said debtor, except the wearing apparel of himself and family; and all the estate, right, title, interest, benefit, claim, and demand of the said debtor of, in, to, or out of the same respectively, To have, hold, receive, and take the same, and all benefit thereof, unto the said trustees, their heirs, executors, administrators, and assigns, Upon trust with all convenient speed absolutely to sell and dispose of all the said trust-estate and effects in their nature saleable, either by public auction or private contract, and either together in one lot, or otherwise, for the best price or prices and most money that can be obtained for the same, with power to sell the same on credit to any person or persons whomsoever with or without security as they may think proper, and to assign and convey the same accordingly, and to collect and receive all the debts and sums of money due and owing to the said debtor, and stand possessed of the money arising therefrom and under these presents, upon the trusts hereinafter mentioned: And the said debtor doth hereby make, ordain, constitute, and appoint the said trustees his attorneys, &c., &c. And it is hereby declared that the said trustees, their executors or

administrators, shall stand possessed of the moneys which shall arise or be received under these presents, in trust, after payment and retention of all costs, charges, and expenses which shall have been and may be incurred in or about the preparation of these presents, and the execution of the trusts and powers hereof, *to pay, divide, and distribute the residue of the said moneys unto and amongst all and every the creditors of *the said debtor*, their executors, administrators, and assigns, respectively, in a rateable proportion, without any [*596 preference, and, in case of any surplus, to pay the same to the said debtor, his executors, administrators, or assigns: Provided always that the said trustees and trustee for the time being may, if they or he shall think fit, require any person claiming to be a creditor of the said debtor to prove his debt by statutory declaration, or otherwise, in such manner as is required by the law of bankruptcy: Provided that, notwithstanding anything herein contained, any creditor at the time of executing or assenting to these presents having for his demand or any part thereof any specific lien or security, or the suretyship of any person, may assent to and execute these presents without prejudice thereto: And the said debtor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said trustees, their executors and administrators, that he, the said debtor, shall and will to the best of his power forthwith make and deliver a true and exact account in writing of all his estate and effects, and aid and assist the said trustees in the management of the affairs of the said trust-estate, and shall not receive or intermeddle with any of the said estate, but confirm and allow all and whatsoever the said trustees shall lawfully do or cause to be done in or about the premises: And it is hereby agreed and declared that it shall be lawful for the said trustees to employ the said debtor or any other person or persons in winding up the said trust-estate and premises, and in collecting, getting in, and disposing of the same, or any part thereof, and to allow to the said debtor or any other person or persons out of the said trust-estate, moneys, and premises, such sum and sums as to the said trustees shall seem proper: And the said several persons *parties hereto of the third part*, in *consideration of the premises, do [*597 hereby for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant and agree with and to the said debtor, his heirs, executors, and administrators, that they the said parties hereto of the third part shall not nor will at any time hereafter sue, arrest, attach, take in execution, or otherwise impede or encumber the said debtor in any manner on account of their said several debts; and that, if any of them should do so, contrary to the intent and meaning of these presents, that then the said debtor, his heirs, executors, and administrators shall be and are and is hereby declared to be clearly acquitted, exonerated, and for ever discharged of and from all actions, suits, *debts, and demands* whatsoever of the creditor or creditors by whom they or he shall be so sued, arrested, attached, taken in execution, or otherwise impeded or encumbered, and these presents may be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be: Provided always and it is hereby agreed that if it shall at any time hereafter

appear that the said debtor has concealed any portion or portions of his estate and effects, or if he shall, when required by the said trustees, their executors or administrators, refuse or neglect to deliver upon solemn declaration such statement in writing of all his estate and effects as aforesaid, immediately thereupon and from thenceforth the covenant on the part of the said several creditors not to sue him the said debtor for the amount of their respective debts lastly hereinbefore contained, shall cease and be no longer binding, and it shall be lawful for the said several creditors forthwith to sue for the full amount of their
*598] respective debts or for such parts *thereof as they shall not actually have received by virtue of the trusts hereinbefore declared: Provided always that the said trustees shall be at liberty to make all fair and usual charges for all such matters and things as may be done by them relative to the said trust-estate, and shall not be charged with or accountable for any moneys or effects other than such as shall actually come to their hands by virtue of these presents, nor with or for any loss or damage which may happen in or about the execution of the trusts aforesaid without their wilful neglect or default. In witness," &c. Averment, that all conditions mentioned in the said Act in that behalf were observed, and all things were done and happened, so as to render the said deed a valid deed within the Bankruptcy Act, 1861, and so as to render the same as valid, effectual, and binding on all the creditors of the defendant, including the plaintiff, as if he was a party to and had duly executed the same; and a majority in number representing three-fourths in value of the creditors of the defendant whose debts respectively amounted to 10*l.* and upwards, in writing assented to and approved of the said deed; and the said trustees appointed by the said deed executed the same; and the execution of the said deed by the defendant was attested by an attorney; and, within twenty-eight days after the execution of the said deed by the defendant, the same was produced and left (having been first duly stamped) at the office of the chief registrar in bankruptcy, for the purpose of being registered; and, together with the said deed, there was delivered to the said chief registrar such affidavit and certificate as by the Bankruptcy Act, 1861, is in that behalf required; and such deed before registration bore such ordinary and ad valorem
*599] stamps as in the said last-mentioned *statute is provided; and, immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession, was given to the said trustees; and the said deed was within twenty-eight days from and after the execution thereof by the defendant duly registered in the Court of Bankruptcy, and notice of the filing and registration of the said deed was duly given as required by the said statute, and a certificate of the filing and registration of the said deed under the hand of the chief registrar and the seal of the Court of Bankruptcy was duly granted to the defendant; and at the time of the execution of the said deed as aforesaid the plaintiff was a creditor of the defendant in respect of the claim herein pleaded to, within the meaning of the Bankruptcy Act, 1861; and all things had been done and had happened to cause the said deed to be and enure, and the same was and is, a release to

the defendant of and from the said claim of the plaintiff in the introductory part of this plea mentioned.

The plaintiff demurred to the third plea, the ground of demurrer stated in the margin being, "that the composition-deed is not a valid deed under the Bankruptcy Act, 1861, so as to bind non-assenting creditors." Joinder.

He also replied to the third plea, that the respective amounts of the debts due to the creditors parties to the said deed of the third part, were by the said deed admitted, by the same being on the said deed set opposite to their respective names, as stated in the said deed, without being proved by statutory declaration or otherwise in such manner as is required by the law of bankruptcy, while the amount of the debt due to the plaintiff was not so or in any other manner *admitted; and so the plaintiff said that he was not by the said deed put on a footing of equality with the other creditors. [*600

The defendant took issue on the above replication, and also demurred thereto, the ground of demurrer stated in the margin being "that it does not appear from the said deed that the plaintiff was not by the said deed put on a footing of equality with the other creditors, and that no such consequence as is in the said replication in that behalf alleged necessarily follows from the terms of the said deed and the true construction of the provisions thereof." Joinder.

J. Brown, Q. C., for the plaintiff.(a)—The deed relied on as a bar to the further maintenance of the action, is a deed between the debtor of the first part, *trustees of the second part, and scheduled creditors of the third part. It recites that the debtor was [*601 indebted to *his creditors* in divers sums of money, and particularly to *the parties of the third part* in the several sums set opposite to their names in the schedule,—a distinction being drawn throughout between "creditors" and "creditors parties to the deed,"—and, being unable to pay them all in full, had agreed to execute an assignment. The debtor then assigns all his estate and effects to the trustees, in trust for distribution amongst *all his creditors*, not merely those whose debts are mentioned in the schedule. Then comes the important covenant, —a covenant by *the parties of the third part* not to sue the debtor, and that, if any of them did sue, the debtor should be discharged of his debt, and the deed might be pleaded in bar as effectually as a release under seal. The first objection to this deed, is, that the covenant not to sue is confined to the scheduled creditors,—the parties of the third part. [BYLES, J.—Is the release a necessary part of the deed?] To

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed relied upon, and set out in the defendant's third plea, is not binding upon the plaintiff, he not having executed the same:

"2. That the deed is not a binding deed of arrangement upon non-assentient creditors, within the meaning of the 192d section of the Bankruptcy Act, 1861, and therefore shows no defence to the action:

"3. That the deed contains unreasonable clauses, covenants, and provisions, which create an inequality among the creditors; for example, the clauses admitting the debts of executing creditors, and empowering the trustees to require proof of other debts by statutory declaration or otherwise, as in bankruptcy; and the clause discharging the defendant from the debts of creditors who may sue him, and making the deed a bar to an action; and the provision which makes the powers of the trustees pass to their executors and administrators:

"4. That the covenant not to sue the defendant only applies to those creditors who executed the deed, and is unreasonable if it applies to any others."

make a good plea in bar, it is essential that there should be either a release or a covenant not to sue: Eyre *v.* Archer, 16 C. B. N. S. 638 (E. C. L. R. vol. 111). Legg *v.* Cheesebrough, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), is precisely in point. There to an action against them as the acceptors of a bill of exchange, the defendants pleaded a plea founded upon a deed of arrangement made by the defendants with their creditors, under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), which had not been signed by the plaintiff, but which was said on the part of the defendants to be nevertheless binding on him by reason of its being executed by six-sevenths in number and value of their creditors. The instrument was not a
*602] composition-deed;(a) *but it contained a clause by which each of the creditors *parties to or bound by the deed* covenanted not to sue, impede, or molest the defendant; and then followed another clause, to the effect, that, if any creditor *by whom or on whose behalf the deed should have been actually executed* should act contrary to that covenant, the defendants should be absolutely discharged from all claims and demands both at law and in equity by such creditor. It was held that this latter clause was not binding upon the plaintiff,—it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. Willes, J., in delivering the judgment of the Court, after referring to Gibbons *v.* Vouillon, 8 C. B. 483 (E. C. L. R. vol. 65), to show that the clause in question rendered the deed operative as a defeasance pleadable in bar to an action brought by a creditor, says: "The distinction is carefully made by the language of the instrument, between such creditors as are to be bound by the deed and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeasance. It was argued, however, on the part of the defendants, that such a distinction is precluded by the language of the 224th section, which says that every such deed shall be as effectual and obligatory in all respects on all the creditors who shall not have signed such deed 'as if they had actually signed the same.' On the other hand, it was contended that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. We are of that opinion. The expression so much relied upon by the defendants is used only to describe the operation and effect
*603] of the *power given to the majority of the creditors to bind the minority, when the intention to exercise that power is expressed in apt words, and not with the view of restraining or expanding the proper meaning of the words which have actually been used. We give the language relied upon full effect, by holding that those provisions of the deed which appear by the language used to have been intended by the debtor and the creditors who sign, to bind the dissenting creditors, shall bind them; whilst those which appear by the language used to have been intended to bind the creditors who 'actually' sign only, and not the dissenting creditors, shall not bind such creditors." [BYLES, J.—There the property remained in the debtor.] Yes. In the judgment the Court refer to Macnaught *v.* Russell, 1 Hurlst. & N. 611,† where Pollock, C. B., says: "It was objected that

(a) It was a deed of inspectorship.

there was a provision set out relating to creditors not proceeding at law for their debts,(*a*) which was unreasonable, and which a creditor ought not to be required to enter into. We were at first much struck with this objection; but, upon consideration, we think it is not fatal to the plea. It is expressly confined to the creditors who are parties to the deed. The plaintiffs are in no way bound by it: they became affected by reason of six-sevenths of the creditors having executed the deed; and we do not think that it is of any material consequence to them that the six-sevenths who have signed have entered into a covenant which may impose a hardship upon *them;* this was a matter for *their* consideration, and the plaintiff is in no way injured by *their* voluntarily choosing to take this obligation upon them." Mr. Commissioner Holroyd, before whom this question was raised in Ex parte Smith, In re Wyatt, 12 W. R. 692, *upon this very deed, said: "The main question here arises with regard to the [*604 construction to be put upon the covenant not to sue. The question is, whether it is binding upon dissenting as well as upon assenting creditors. Now, I certainly think that the covenant is binding upon assenting creditors only. The 197th section of the Bankruptcy Act, 1861, coupled with the cases of Macnaught *v.* Russell and Legg *v.* Cheesebrough, are to my mind conclusive upon the matter. I am of opinion, therefore, that the covenant is binding on those creditors only who execute the deed, and I do not think the question of inequality of distribution arises at all. In Dell *v.* King, 2 Hurlst. & Colt. 84,† the clauses were much more extended, and included all the creditors of the debtor." If the covenant not to sue extended to non-executing creditors, it clearly would be unreasonable. That was expressly decided in Dell *v.* King, 2 Hurlst. & Colt. 84;† Ipstones Park Iron Ore Company *v.* Pattison, 2 Hurlst. & Colt. 828.† It is competent to parties to bargain as they will: but non-assenting creditors are not necessarily bound. [BYLES, J.—In Dell *v.* King, the deed was held bad, on the ground that the assenting creditors had no right to preclude non-assenting creditors from contesting its validity. In Hidson *v.* Barclay, 3 Hurlst. & Colt. 9,† the covenant not to sue professed to bind "the creditors of the debtor who should have executed or otherwise acceded to or were bound by those presents;" and it was held to be unreasonable and void. This judgment was reversed in the Exchequer Chamber, 3 Hurlst. & Colt. 361.† But, in delivering the judgment of that Court, Blackburn, J., said: "A simple release by a creditor given to a debtor discharges all sureties and co-debtors, and it is therefore in general inexpedient to insert a simple release in a composition-deed. *But a covenant not to sue the debtor, except in so far as may be necessary for the purpose of enforcing [*605 remedies against others, only bars the covenantor from suing for himself, but does not discharge sureties or co-contractors. It has the operation of a release so far as it is expedient in a composition-deed to release the debtor, and no further; and it is therefore, as we think, a proper and reasonable provision to insert in a deed relating to the debts and liabilities of a debtor, and his release therefrom. We are not to be understood as in any way overruling the decision in Dell *v.* King, that a covenant not to sue, with a provision

(*a*) Substantially the same as the covenant here.

that the creditor infringing that covenant shall forfeit all benefit under the composition-deed, goes too far. We decide the present point in favour of the defendant, because we construe the eighth covenant in this deed as amounting to a simple covenant not to sue except so far as is necessary to prevent the discharge of third parties, and no more." Then, the schedule debts are admitted, but non-assenting creditors are to be called on to prove their debts by statutory declaration before they can derive any benefit under the deed. This is clearly unequal.

Sykes (with whom was *Mellish*, Q. C.), for the defendant.(a)—A distinction has always been drawn between those who are bound by the deed and those bound by virtue of the Act of Parliament. Clapham *v.* Atkinson,* 4 Best & Smith 722 (in error, 730), and numerous other cases, have held that a deed which complies with all the conditions contained in the 192d section of the Bankruptcy Act, 1861, is a good defence to an *action. There is nothing in the deed now in question which is repugnant to those provisions,

*606]

*607]

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the deed set out in the third plea appears on the face of it to be for the equal benefit of all the creditors of the defendant, and is such as to enable all the creditors of the defendant to avail themselves of it:

"2. That the said deed is a valid deed within the 192d section of the Bankruptcy Act, 1861, and binding on all the creditors of the defendant (including the plaintiff), as if they had been parties to and had duly executed the same:

"3. That, by the said deed, it is expressly provided that the said trustees may, if they shall think fit, require any person claiming to be a creditor of the said defendant to prove his debt by statutory declaration or otherwise, in such manner as is required by the law of bankruptcy; that this proviso applies to any creditor, whether he has executed the deed or not; and that therefore the plaintiff was not put on any footing of inequality with the other creditors who executed the deed, by its being recited in the said deed that the defendant was indebted unto the several parties thereto of the third part in the several sums of money set opposite their respective names in the schedule thereunder written, as they might have been called upon by the said trustees to prove their debts according to the said proviso, notwithstanding the said recital in the said deed:

"4. That there is nothing unreasonable in the proviso that the trustees may require a creditor to prove his debt by statutory declaration or otherwise in such manner as is required by the law of bankruptcy.

"5. That the plaintiff might at any time have come in and executed the said deed, and had his name and the amount of his debt inserted in the schedule of the said deed, in the same manner as the other creditors of the defendant who executed the deed: and that no distinction is drawn in the said deed between the creditors of the defendant who executed it and those who did not; but that the said deed was intended to apply to, and does apply to, all the creditors of the defendant, whether they executed the said deed or not:

"6. That the covenant by the creditors contained in the said deed, not to sue the defendant, &c., and that, if any of them should do so contrary to the said covenant, the defendant should be exonerated and discharged of and from all actions, suits, claims, and demands of the creditor or creditors by whom he should be so sued, &c., and that the said deed might be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be, renders the deed operative as a *defeasance* pleadable in bar to any action brought by any creditor of the defendant; that such clause was intended to be binding, and is binding on *all the creditors of the defendant*, and is binding on the plaintiff, notwithstanding he did not execute the said deed:

"7. That such last-mentioned clause is not unreasonable, and does not render the said deed void, as it only enables the defendant, in case of his being sued by any of his creditors, to plead the said deed in bar as a release to such action; and such creditor suing the defendant will not thereby lose or forfeit his debt, but will still retain his right to prove the amount of his debt and claim his dividend thereon out of the defendant's property assigned to the said trustees by the said deed:

"8. That the clause in the said deed which makes the powers of the trustees pass to their executors and administrators, is a mere formal and usual clause in trust-deeds like the present, and does not in any way prejudice the creditors, but is rather for their benefit than otherwise; and that there is nothing unreasonable in such clause, so as to render such deed void."

or unreasonable. The covenant not to sue is limited to the creditors executing the deed. In Wells *v.* Hacon, 5 Best & Smith 196, the release was held to enure as a release by the non-assenting creditors by virtue of the statute. Cockburn, C. J., in giving judgment, said: "The release of the debtor professes to be only by the executing creditors, who are parties of the fourth part; and no mention is made of a release by the creditors of the fifth part" (the non-executing creditors). "But, there being no negative words excluding them, the effect is the same as if the executing creditors had said 'we *release our debts,' and then, according to the decisions on the [*608 Bankruptcy Act, 1861, that the release operates as a release of the debts of the non-executing creditors, who are in no sense parties to the deed, except by virtue of the statute. In Legg *v.* Cheesebrough, the defeasance was in terms confined to those who actually executed the deed; and the Court thought that the language showed an intention to exclude those creditors who did not execute the deed. Here, it is as if the executing creditors had released on behalf of themselves and of those who are bound by the deed." And Blackburn, J., says: "We held in Whitehead *v.* Porter, 5 Best & Smith, 193 that a deed containing a release may be pleaded in bar to an action by a non-assenting creditor; and that is good law. Deeds which are trust-deeds only, and do not contain any release, but simply distribute the property of the debtor in bankruptcy, are not pleadable in bar: and, if this deed did not operate as a release by the non-executing creditors, it could not be pleaded in bar to this action. But s. 192 says that every deed made between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any such matters, shall be as valid and effectual and binding on all the creditors as if they were parties to and duly executed the same, provided the prescribed conditions are observed. The execution of a deed by one creditor cannot release the debt of another creditor who has not executed the deed. But the effect of s. 192 must be, that, when the requisite majority execute a release of the debtor, and it appears on the face of the deed that it was intended it should be a release by all the creditors, those who do not execute are bound as if each of them had executed it, and released *his own debt." The decision in Legg *v.* [*609 Cheesebrough turned on the particular language of the deed: the release was not intended to bind non-assenting creditors. Macnaught *v.* Russell, 1 Hurlst. & N. 611,† was decided on the same ground: and in Gardner *v* Chapman, 8 C. B. N. S. 317 (E. C. L. R. vol. 98), a similar provision was treated as a covenant not to sue, for the purpose of keeping alive the remedies against sureties. In Spitzer *v.* Chaffers, 14 C. B. N. S. 686 (E. C. L. R. vol. 108), it was held that a deed under the 224th section of the Bankrupt Law Consolidation Act, 1849, was not rendered void by the circumstance that the releasing parties were described to be "the parties hereto of the third part," viz. such of the creditors who had executed the deed,—the deed appearing to have been executed by the statutory number required to make it a deed binding upon non-assenting creditors. [MONTAGUE SMITH, J.—The covenant here professes to release, not the action only,

but the *debt*.] It is called at the end a covenant not to sue. [ERLE, C. J.—Our judgment must turn upon the true construction of the deed before us. Mr. *Brown* says that the party has lost his debt. The defendant denies that. The truth is to be gathered from the terms of the plea. But for the words "debts and demands," your argument might be good.] General words are to be restrained by the intention apparent upon the whole deed. This is clearly intended to operate only as a covenant not to sue. In Walker *v.* Nevill, 3 Hurlst. & Colt. 403,† it was held that a simple covenant not to sue for a limited time, is not pleadable in bar of an action: but a covenant not to sue for a limited time, and that the deed may be pleaded in bar and discharge of any action brought within that time, may be pleaded in bar of an action by a non-assenting creditor. General words of release are to be restrained by a particular recital: Com. Dig. *Release* (E. 5); *610] Paylor *v.* *Homersham, 4 M. & Selw. 423; Simons *v.* Johnson, 3 B. & Ad. 175 (E. C. L. R. vol. 23); 2 Smith's Leading Cases, 5th edit. 451; Lyall *v.* Edwards, 6 Hurlst. & N. 337.† Mr. Commissioner Holroyd's opinion in Ex parte Smith, In re Wyatt, 12 W. R. 692, was delivered before much light had been thrown upon the subject by the decided cases. Dingwell *v.* Edwards, 33 Law J., Q. B. 161, and Garrod *v.* Simpson, 3 Hurlst. & Colt. 395,† were also referred to, for the purpose of showing that a release is not necessary in the case of a composition-deed.

Brown, Q. C., in reply.—If the covenant in question amounts to a release, it is unreasonable; if not, it affords no defence.

ERLE, C. J.—The question raised by this demurrer is, whether the deed, which is pleaded to the further maintenance of this action, is a valid deed under the 192d section of the Bankruptcy Act, 1861, as against the plaintiff, a non-executing creditor. It is clear that a deed may be a valid deed to bring the estate of the debtor under the jurisdiction of the Court of Bankruptcy, and to be a protection to the debtor, without its containing a release. But, unless it contains a release, it cannot be pleaded in bar to an action: Eyre *v.* Archer, 16 C. B. N. S. 638 (E. C. L. R. vol. 111). In this deed there is a clause of release: and, if that had been merely a covenant not to sue, I consider the deed would have been a good bar to the action. I take the judgment of Blackburn, J., in Hidson *v.* Barclay, 3 Hurlst. & Colt. 361,† and also the decision of this Court in Spitzer *v.* Chaffers, 14 C. B. N. S. 686 (E. C. L. R. vol. 108), to affirm that proposition. But, if the clause of release and covenant not to sue goes beyond that operation, and professes to declare the debt forfeited if the debtor be sued or molested, it is void as against non-assenting creditors. I am of *opinion that the present deed is open to that objection. *611] The clause in question is in these terms,—"The said several persons parties hereto of the third part,"—that is, the creditors executing the deed,—"in consideration of the premises, do hereby, for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and partners, covenant and agree with and to the said debtor, his heirs, executors, and administrators, that they the said parties hereto of the third part shall not nor will at any time hereafter sue, arrest, attach, take in execution, or otherwise impede or encumber the said debtor in any manner on

account of their said several debts: and that, if any of them should do so, contrary to the intent and meaning of these presents, that then the said debtor, his heirs, executors, and administrators, shall be and are and is hereby declared to be clearly acquitted, exonerated, and for ever discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom they or he shall be so sued, arrested, attached, taken in execution, or otherwise impeded or encumbered, and these presents may be pleaded in bar thereto as effectually as a release under the hands and seals of such creditors respectively for that purpose might or could be." I cannot read those words without coming to the conclusion, that, if any creditor who had executed the deed were to sue the debtor, he would forfeit his debt.

That being the meaning of this deed, the defendant is in this dilemma,—if all the non-assenting creditors are brought in by the operation of the statute (the requisite majority having executed), the deed would be in pari jure with that in Dell *v.* King, 2 Hurlst. & Colt. 84,† where the clause was, that non-assenting as well as assenting creditors were to forfeit their debts if they sued. It is unreasonable that a creditor who proceeds *to enforce his rights at law should forfeit his debt because the majority of the creditors choose to execute a release. But I am desirous to construe this deed so as to make it valid rather than void; and I think it is clear from Legg *v.* Cheesebrough that a deed may be a valid deed under the 192d section of the Bankruptcy Act, 1861, although it contains a clause of release and a clause that any creditor suing or molesting the debtor shall forfeit his debt, provided that clause of forfeiture is clearly limited to those creditors who choose to execute the deed. In that case it was held that the clause of forfeiture was in terms confined to the creditors' parties to and who had executed the deed. The deed here is drawn with a marked distinction between creditors who execute the deed and those who do not execute it. It professes to be made between the debtor of the first part, the trustees of the second part, and the several persons whose names and seals were thereunto subscribed and affixed in the schedule thereunder written, being creditors, of the third part; and the release is in terms confined to "the several persons parties thereto of the third part." They may if they choose contract in that form; and the deed may become binding upon all the creditors, all the conditions of the Bankruptcy Act, 1861, being complied with. The terms of this clause are not so clear as they were in Legg *v.* Cheesebrough. But it seems to me that the defendant is in this dilemma: if the clause applies to non-executing creditors, as in Dell *v.* King, the deed is void as unreasonable; but, if the other construction be adopted, and the release be held binding on the assenting creditors only, the present plaintiff has not executed it, and then the deed is without a clause of release, and is simply operative in bankruptcy, and is no bar to the action. In either view, therefore, my judgment is for the plaintiff. [*612

*Byles, J.—I am of the same opinion. The plea in question sets up a deed whereby the defendant assigns all his property for the benefit of his creditors, but containing a covenant by them not to sue or molest the debtor on account of the several debts, and that, if any creditor party to the deed should do so, the debtor should be exonerated [*613

and discharged from all actions, suits, debts, and demands of the creditor by whom he should be so sued, &c., and the deed might be pleaded in bar of the action as effectually as a release might be. That must be an unreasonable covenant as to non-executing creditors, because, though they may have no notice of the existence of the deed, the moment the writ is issued the debt is gone. In Dell *v.* King, 2 Hurlst. & Colt. 84,† such a clause was held to be unreasonable. The only distinction between that case and the present is, that there the clause of release applied to all the creditors, whereas here it is confined in terms to the creditors executing the deed, and, without the aid of the Act of Parliament, would not operate as a release by this plaintiff. The Act says that the deed, when executed by the requisite number, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties thereto, and had executed the same. That comes to this, that a man may without notice of the deed lose his debt, which is clearly unreasonable. Dell *v.* King was upheld, as to this point, by the Exchequer Chamber, in Hidson *v.* Barclay, 3 Hurlst. & Colt. 361.†

MONTAGUE SMITH, J.—I am of the same opinion. If the release is confined to creditors executing the deed, the defendant cannot take advantage of it in this action; for, if so, according to Legg *v.* Cheesebrough, it has no operation as to non-executing creditors. I do not mean
*614] to give any opinion upon the construction of *this deed, because, in Legg *v.* Cheesebrough, the clause of release was confined in terms to creditors actually executing the deed, and here it is a question on the whole deed. To derive any benefit from this release, the defendant must contend that it binds non-executing creditors. That will depend upon whether it is a reasonable clause or not. Upon the authorities, and especially on that of Dell *v.* King, I am of opinion that this is an unreasonable clause. It is not merely a bar of the action, but if a creditor seeks to enforce a debt, he forfeits it. That clearly is not within the line of reasonable terms in deeds of this kind, and therefore cannot operate on those creditors who have not executed.

Judgment for the plaintiff.

BULLEN and Another *v.* SHARP the Elder. *April* 26.

S., being about to commence business as an underwriter through the agency of one F., in consideration of the defendant (his father) engaging to hold 5000*l.* available for him for the purpose of carrying out the arrangement, gave him the following memorandum,—"In consideration of your guaranteeing me to the extent of 5000*l.* in my business of an underwriter, until by such business I shall make or acquire from the profits thereof 5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500*l.*, being equal to 10*l.* per cent. per annum on 5000*l.*; and further, that, if at the end of three years from the date hereof it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years:" the memorandum concluded with these words,—"moreover, in no case are you to be considered as a partner with me in the said business of an underwriter."

By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., as trustees, "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of F., and all such as shall hereafter come into the hands of F. on account or in

respect of the said underwriting business." The deed also contained a power of attorney enabling the trustees to receive the whole proceeds of the business: and the first trust was, to pay the defendant 500*l.* a year, with an additional sum when the profits of the business should have realized a given sum, and a covenant, that, when the accumulated profits should have reached 8500*l.*, and continued at that amount without reduction for two years, the trustees should reassign to S. "the said moneys and *profits* arising from the aforesaid underwriting business."

Held,—upon a special case, setting out the memorandum and the marriage settlement, and in which it was agreed that the Court should draw "any reasonable inferences of fact,"—that the *deed*, at all events, constituted the defendant a partner in the business, and consequently that he was liable on a policy underwritten by S.

THIS was an action to recover 100*l.* for a loss on a marine policy of assurance effected by the plaintiffs and signed in the name of William Sharp the younger, *a son of the defendant, with whom the defendant was alleged to have been a partner, under the circumstances hereinafter mentioned :— [*615

The cause came to be tried before Erle, C. J., at the sittings in London after last Michaelmas Term, when a verdict was taken for the plaintiffs by consent, on all the issues, subject to the opinion of the Court on the following case :—

1. In the beginning of 1857, the defendant applied to one Fenn, an underwriter at Lloyd's, to introduce the defendant's son, William Sharp jun., to Lloyd's, with a view to his becoming a member of that body. Fenn shortly afterwards told the defendant that he had been before the committee at Lloyd's, and that they had suggested that the defendant should give a guarantee for the liabilities to be incurred by his son. This the defendant objected to do, but stated that he might not be unwilling to give his guarantee for a limited amount.

2. Fenn thereupon sent the committee of Lloyd's the following letter:—

"March 17th, 1857.

"The committee of management of the affairs of Lloyd's.

"Gentlemen,—I have communicated with Mr. Sharp sen. your requirements as to his son's admittance as a member of Lloyd's; and he tells me that he has such a strong repugnance against guarantees that he is willing to place at my disposal 5000*l.* (instead of 3000*l*). If this meets with your approval, I can further add that he (Mr. S.) assures me that he would never let his son stand in want of further aid, if needed.

"As this introduction is entirely Mr. Sharp senior's own seeking, I feel the less careful about it, and shall gladly fall in with the determination you come to in the matter, only expressing my regret that I should be *the cause of giving you so much unnecessary trouble in this case. But, had I known then what I see now, I would have sought such guarantee before laying my application before you. [*616

"Should this not meet with your full concurrence, may I ask to have Mr. Sharp junr.'s name at once withdrawn.

"WILLIAM FENN."

3. On receipt of this letter, the committee of Lloyd's elected the defendant's son, Mr. Sharp jun., a member of Lloyd's.

4. At the same time the defendant's said son entered into an agreement with Fenn for him to transact the son's underwriting business for a period of three years, of which the following is a copy :—

"Memorandum of agreement made and entered into the 17th day

of March, 1857, between William Sharp jun., of Upper Clapton, in the county of Middlesex, of the one part, and William Fenn, of Lloyd's, in the city of London, underwriter, of the other part: Whereas, it hath been agreed between the said parties that an underwriting account at Lloyd's Coffee-House, London, shall be opened and carried on in the name of the said William Sharp, under the management and Superintendence of the said William Fenn, for the time and upon the terms and conditions hereinafter mentioned, that is to say,—

"1st. That, as far as practicable, all risks taken on account of the said William Sharp shall be identical with those taken by the said William Fenn on his own account; and that the exceptions or single lines shall be taken, as far as practicable, alternately by the said William Sharp and William Fenn, if the said William Sharp shall require it.

"2d. That the underwriting account shall commence on the 18th of March, 1857, and shall be *carried on and the subscription made in the name of the said William Sharp: but the policies, losses, and averages shall and may be adjusted by the said William Fenn on his account.

*617]

"3d. That the said William Sharp shall apply so much of his attention and time to the purposes of the said business as may be essential to him; and the said William Fenn shall apply such part of his time and attention to the business as may be required for conducting the same; but he is not to be precluded from carrying on the said business as an underwriter in his own name and on his own account.

"4th. That the said underwriting business shall be carried on for the term of three years from the 1st of March, 1857, after which the said business may be determined either by the said William Sharp or William Fenn, on giving three months' notice to the other, or leaving the same at his usual or then last known place of abode in England, upon the expiration of which notice the said business shall cease and determine, and the accounts thereof be settled and wound up.

"5th. That proper books of account, and all securities, letters, and documents relating to the said business shall be kept by the said William Fenn at his counting-house, and proper entries made therein of all such insurances, transactions, and things as are usually written and entered in books of account kept by persons engaged in concerns of a similar nature; and that each of the parties shall have free access to inspect, cast up, examine, and copy out the same, without any hindrance or denial of or by the other of them.

"6th. That all premiums and other moneys arising or payable in respect of the said business shall be received by the said William Fenn, and paid to the *account of the said William Sharp at his bankers' during the said term; and all payments and advances in respect thereof shall be made and paid by him exclusively, the said William Sharp providing the necessary funds for the purpose.

*618]

"7th. That the said William Fenn shall during the said term be paid and allowed a salary of 300*l.* per annum; and that the said salary or sum of 300*l.* shall be paid to the said William Fenn by four equal quarterly payments or instalments in each and every year, on the 30th of May, the 31st of August, the 30th of November, and the 28th of February, in every year,—the first payment to be made on the 30th of May now next ensuing.

8th. "That the said William Fenn engages to give such underwriting business his best care and attention.

"9th. That, after the expiration of this agreement the said William Fenn shall, if required, attend to the winding up of the said account and the adjusting and settling of losses thereunder: but the said salary shall cease at the expiration of the said term of three years, or the determination of the said underwriting account if continued beyond that period.

"10th. That no risk is to be taken by the said William Sharp personally during the continuance of this agreement, without the consent of the said William Fenn. In witness, &c.

"WILLIAM FENN,"

"WILLIAM SHARP, Jun."

5. Under this agreement, the underwriting business of the son, Sharp jun., was carried on by Fenn until the agreement was altered in November, 1858, as hereinafter mentioned. Fenn subscribed all policies of insurance for the son in the name of the son.

6. On the 20th of May, 1857, Fenn received the following letter from Lloyd's committee:—

*"Lloyd's, 20th of May, 1857.

"Sir,—I am directed by the committee for managing the [*619 affairs of Lloyd's to request that you will be good enough to inform them, with reference to your letter of the 17th of March, whether the 5000*l.* that you therein mentioned would be placed at your disposal by Mr. Sharp sen. for the benefit of his son's account, has been so appropriated.

"GEO. A. HALSTEAD, Secretary.

"WILLIAM FENN, Esq."

7. Mr. Fenn having communicated this letter to the defendant, he wrote the following letter to Fenn:—

"May 21st, 1857.

"My dear Sir,—In order that you may satisfactorily answer the question put to you by the committee at Lloyd's relative to your having at your disposal the 5000*l.* you represented my son to possess when you proposed him for admission at Lloyd's, I have to inform you that I hold that sum for him, and engage that it shall be freely available for the purpose of carrying out the arrangement he has made with you to conduct for him an underwriting account.

"W. SHARP."

8. On receipt of this, Fenn sent the following answer to the committee of Lloyd's; but such letter was not seen by the defendant, nor was he aware of the contents:—

"May 22d, 1857.

"To the committee of Lloyd's.

"Gentlemen,—In reply to yours of the 20th instant, I beg to inform you that I have the 5000*l.* for the use of Mr. W. Sharp jun. which for my own interest I took care to secure; and I have a further assurance, that, if more should be wanted, I shall not be without funds.

"W. FENN."

*9. The underwriting business carried on by Fenn for the son [*620 having proved profitable, the son, in November, 1858, with the defendant's concurrence, entered into an agreement with Fenn for

extending the business, by increasing the amount of the risk usually taken by the son on policies of insurance.

10. The following is a copy of this agreement:—

"The undersigned do hereby agree this 1st of November, 1858, that, from and after the 1st of November, 1858, and so long as the said William Sharp may require it, the said William Fenn shall write double or increase the lines, for and on account of the said William Sharp, in all practicable cases; and, in consideration thereof, the said William Sharp shall pay the said William Fenn an additional 50*l.* per quarter so long as the said William Sharp requires the said William Fenn to write double or increased lines.

"That the said William Fenn and William Sharp agree to extend the agreement of the 17th day of March, 1857, to the 31st of December, 1864, the same remaining in force, except as altered as above.

"WILLIAM FENN,"

"WILLIAM SHARP, Jun."

11. Shortly after, and in consequence of, this arrangement, the son wrote the following letter to the defendant:—

"To William Sharp, Esq.

"In consideration of your guaranteeing me to the extent of 5000*l.* in my business of an underwriter until by such business I shall make or acquire from the profits thereof the full and clear sum of 5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, but not otherwise, an annuity of 500*l.*, being equal to 10 per cent. per annum on the sum of 5000*l.*, this annuity to be paid without any deduction,

*621] except *on account of the income-tax, by equal half-yearly payments on the 1st of July and the 1st of January in each year, and the first half-yearly payment thereof to be made on the 1st of July next ensuing the date hereof, together with a proportionate part of the said annuity in respect of the time which may elapse between the last pending half-yearly payment of the said annuity and the determination of the same: And, further, that, *if at the end of three years from the date hereof, it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than* 500*l.*, *then and in that case the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years;* the said increased annuity to be paid without deduction, except as aforesaid, by equal half-yearly payments on the days above named, and the first half-yearly payment to be made on the 1st of July, 1862, together with a proportionate part of the said increased annuity in respect of the time which may elapse between the last pending half-yearly payments of the said annuity and the determination thereof; and, *moreover, in no case are you to be considered as a partner with me in the said business of an underwriter.*

"Jan. 1, 1859. "W. SHARP, Jun."

12. In July, 1859, a further agreement was made between Sharp jun. and Fenn, of which the following is a copy:—

"Memorandum. It is mutually agreed between the undersigned that the above agreement of the 17th of March, 1857, shall be continued until the 31st of December, 1870, subject to the sooner

determination thereof after the 31st of December, 1864, by the said *William Sharp the younger giving the said William Fenn six months' notice. [*622

London, 2d July, 1859.

"WILLIAM FENN,"
"WILLIAM SHARP, Jun."

13. Under the above agreements, Fenn carried on the underwriting business for Sharp jun., until and at the time of the making of the policy on which this action is brought.

14. In August, 1859, the defendant's son, William Sharp jun., married a Miss Chamney; and on the occasion of his marriage a deed of settlement was made and executed by and between Sharp jun., Miss Chamney, the defendant, and John Donnison, of which a copy is hereto annexed, and which is to be taken as part of this case.

15. This deed recites the several agreements between Sharp jun. and Fenn, above set forth, and the defendant's letter to Fenn of May 21st, 1857, and the letter of Sharp jun. to the defendant of January 1st, 1859, promising the annuity above mentioned. It also recites the intended marriage, and, that, in contemplation thereof, it had been agreed that Sharp the younger should assign to the said William Sharp the elder and John Donnison all moneys then in the hands and thereafter to come into the hands of the said William Fenn in respect of the aforesaid underwriting business on behalf and for the benefit of the said William Sharp the younger, and should also transfer to them stock being of the nominal value of 1000*l.* in the London and North Western Railway, and stock being of the nominal value of 500*l.* in the London and South Western Railway, and should likewise assign to them the policy of assurance thereinafter mentioned on the life of the said William Sharp the younger for the sum of 3000*l.*, to be held respectively by them upon *the trusts and for the intents and purposes thereinafter expressed; and, that, in pursuance of the [*623 said agreement, the said William Sharp the younger did previously to the execution of the said deed transfer all the railway stock into the names of the said William Sharp the elder and John Donnison in the share register books of the said railway companies respectively, to be held in trust for the said William Sharp the younger until the solemnization of the said intended marriage, and, after the solemnization thereof, upon the trusts and for the intents and purposes thereinafter declared and expressed concerning the same. The deed then witnesses, that, for the considerations therein mentioned, Sharp jun. assigned to the defendant and the said John Donnison all and singular the sums of money, earnings, profits, and emoluments which were then in the hands of the said William Fenn, and all such as should come into the hands of the said William Fenn on account or in respect of the underwriting business, and which according to the terms of the said agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2d of the then present month of July, respectively, or otherwise, were or would or might become payable, to the said William Sharp the younger, together with full power and authority to and for the said William Sharp the elder and John Donnison and the survivor of them, and the executors or administrators of such survivor, in the name or names and as the attorneys or attorney

of the said William Sharp the younger, to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for the said moneys, proceeds, and premises expressed and intended to be thereby assigned, and every or any part thereof: And the said William Sharp the younger did thereby order and direct the said William Fenn and other the agent, *deputy, and attorney for the time being of the said William Sharp the younger in the aforesaid business, to pay the said moneys, profits, and premises unto the said William Sharp the elder and John Donnison, their executors, administrators, and assigns, accordingly, To have and to hold the said moneys, profits, and other the premises thereinafter mentioned, and thereby granted and assigned, or expressed and intended so to be, unto the said William Sharp the elder and John Donnison, their executors, administrators, and assigns, In trust, nevertheless, for the said William Sharp the younger until the said intended marriage between him and the said Maria Louisa Perkins Chamney should be solemnized; and, from and after the solemnization thereof, upon the trusts and for the intents and purposes thereinafter declared and expressed concerning the same, that is to say, upon trust with and out of the moneys and profits arising from the said underwriting business, in the first place to pay unto the said William Sharp the elder, by half-yearly payments, on the 1st of January and the 1st of July in every year, and the first half-yearly payment to be made on the 1st of January next after the solemnization of the said intended marriage, the annuity or yearly sum agreed or undertaken to be paid by the said William Sharp the younger to the said William Sharp the elder by the said thereinbefore-recited memorandum or writing under the hand of the said William Sharp the younger, dated the 1st of January, 1859; and, subject and without prejudice to the payment of the aforesaid annuity or yearly sum, to the said William Sharp the elder, upon trust, in the next place, with and out of the said moneys, profits, and premises, to pay to the said William Sharp the younger, by equal half-yearly payments, on the days above mentioned, and the first payment thereof to be made on the 1st of January then *next after the solemnization of the said intended marriage, an annuity or yearly sum of 500*l.* free from all deductions; and also upon trust to pay to him, when and as the same became due, the dividends, interest, and annual proceeds of the aforesaid railway shares; and also the resulting income of the surplus moneys, profits, and premises to be accumulated and invested as thereinafter directed; and upon further trust to accumulate and invest, in manner thereinafter expressed, the residue or surplus after the payments aforesaid of the said moneys, profits, and premises thereinbefore assigned, until the same should amount to or be of the value of 3500*l.* sterling, and should remain of that amount or value without reduction on account of losses in the aforesaid underwriting business, and for the full term of two years; and, from and after the time when the said accumulations amount to and remain for two years of the amount or value of 3500*l.*, without reduction as aforesaid, then upon trust with and out of the proceeds of the said underwriting business to pay unto the said William Sharp the younger by such half-yearly payments as aforesaid an annuity or yearly sum of 750*l.*, free from all deductions, in addition to the

*624]

*625]

income of the said accumulations, and of the dividends and annual proceeds of the said railway shares, and to accumulate and invest, in manner thereinafter expressed, the residue or surplus after the payments thereinbefore mentioned of the profits of the said underwriting business until the same should amount to or be of the value of 8500*l.* sterling, and should remain of that amount or value, without reduction on account of losses as aforesaid, for the full term of two years; and, from and after the time when the said accumulations should amount to and remain for two years of the amount or value of 8500*l.* without reduction as aforesaid, then upon trust to reassign the said moneys and *profits arising from the aforesaid underwriting business unto the said William Sharp the younger, his executors, administrators, and assigns, absolutely. [*626

16. The deed contained other provisions more or less material, for which reference was made to the copy.(*a*)

(*a*) The marriage settlement was as follows:—

This indenture, made the 19th day of August, 1859, between William Sharp the younger, of, &c., and of Lloyd's, in the city of London, underwriter, of the first part, Maria Louisa Perkins Chamney, of, &c., spinster, of the second part, and William Sharp the elder, of, &c., and John Donnison, of, &c., of the third part: Whereas, by a memorandum of agreement bearing date the 17th of March, 1857, and made between the said W. Sharp the younger of the one part, and W. Fenn, of Lloyd's aforesaid, underwriter, of the other part, it was agreed between the said parties thereto that an underwriting account at Lloyd's Coffee-House, in the city of London, should be opened and carried on in the name of the said W. Sharp the younger, under the management and superintendence of the said W. Fenn, for the time and upon the terms therein and in part hereinafter mentioned, viz. that, as far as practicable, all risks taken on account of the said W. Sharp the younger should be identical with those taken by the said W. Fenn on his own account, and that the exceptions or single lines should be taken as far as practicable alternately by the said parties; that the underwriting account should commence on the 18th of March, 1857, and be carried on and the subscription made in the name of the said W. Sharp the younger, but the policies, losses, and averages should be adjusted by the said W. Fenn on his account; that the said underwriting business should be carried on for the term of three years from the 1st of March, 1857; that all premiums and other moneys arising or payable in respect of the said business should be received by the said W. Fenn, and paid to the account of the said W. Sharp the younger at his bankers during the said term, and all payments and advances in respect thereof should be made and paid by him exclusively, the said W. Sharp the younger providing the necessary funds for the purpose; that the said W. Fenn should during the said term be paid and allowed a salary of 300*l.* per annum, payable quarterly, as therein mentioned; and that the said W. Fenn should give to such underwriting business his best care and attention: And whereas, on the 21st of May, 1857, the said W. Sharp the elder signed a letter, addressed to the said W. Fenn, informing him that the said W. Sharp the elder held the sum of 5000*l.* for his son the said W. Sharp the younger, and engaging that it should be freely available for the purpose of carrying out the arrangement which the said W. Sharp the younger had made with the said W. Fenn to conduct for the said W. Sharp the younger an underwriting account: And whereas, on the 1st of November, 1858, it was further agreed between the said W. Sharp the younger and the said W. Fenn, that, from and after the 1st of November, 1858, and so long as the said W. Sharp the younger should require it, the said W. Fenn should write double, or increase the lines, for and on account the said W. Sharp the younger, in all practicable cases; and that, in consideration thereof, the said W. Sharp the younger should pay the said W. Fenn an additional 50*l.* per quarter, so long as the said W. Sharp the younger should require the said W. Fenn to write double or increased lines: and the said W. Fenn and W. Sharp the younger also agreed to extend the agreement of the 17th of March, 1857, to the 31st of December, 1864, the same remaining in force except as altered above: And whereas by a writing under the hand of the said W. Sharp the younger, bearing date the 1st of January, 1859, and addressed to the said W. Sharp the elder, the said W. Sharp the younger, in consideration of the said W. Sharp the elder guarantying him to the extent of 5000*l.* in his business of an underwriter until by such business the said W. Sharp the younger should make or acquire from the profits thereof the full and clear sum of 5000*l.* after providing for all known losses, promised and agreed to pay to the said W. Sharp the elder, during his life, an annuity equal to 10*l.* per cent. on the sum of 5000*l.*, with a

*627] *17. After the marriage, the said deed of settlement was acted on by the defendant and Donnison, the trustees mentioned therein; considerable losses were made in the underwriting business

proviso, that, if at the end of three years from the date thereof it should appear that one-quarter of the average profits for that period made by the said W. Sharp the younger in the said business should amount to more than 500*l.*, then and in that case the said annuity should thenceforth be increased to a sum equal to one-quarter of the average profits made by the said W. Sharp the younger in the said business during the said three years: And whereas, on the 2d of July, 1859, it was further agreed between the said W. Sharp the younger and the said W. Fenn, that the said agreement of the 17th of March, 1857, should be continued until the 31st of December, 1870, subject to the sooner determination thereof after the 31st of December, 1864, by the said W. Sharp the younger giving the said W. Fenn six months' notice in writing for that purpose: And whereas a marriage has been agreed upon between the said W. Sharp the younger and the said M. L. P. Chamney, and it is intended that the same shall shortly be had and solemnized: And whereas, in contemplation of the said marriage, it has been agreed that the said W. Sharp the younger should assign to the said W. Sharp the elder and John Donnison all moneys now in the hands and hereafter to come into the hands of the said W. Fenn in respect of the aforesaid underwriting business, on behalf and for the benefit of the said W. Sharp the younger, and should also transfer to them stock being of the nominal value of 100*l.* in the London and North Western Railway, and stock being of the nominal value of 500*l.* in the London and South Western Railway, and should likewise assign to them the policy of assurance hereinafter mentioned on the life of the said W. Sharp the younger for the sum of 3000*l.*, to be held respectively by them upon the trusts and for the intents and purposes hereinafter expressed: And whereas, in pursuance of the said agreement, the said W. Sharp the younger hath, previously to the execution of these presents, transferred the said stock in the London and North Western Railway and the said stock in the London and South Western Railway into the names of the said W. Sharp the elder and John Donnison in the share register books of the said railway companies respectively, to be held in trust for the said W. Sharp the younger until the solemnization of the said intended marriage, and after the solemnization thereof upon the trusts and for the intents and purposes hereinafter declared and expressed concerning the same: Now this indenture witnesseth, that, in further pursuance on the part of the said W. Sharp the younger of the said hereinbefore-recited agreement, and in consideration of the said intended marriage, and also in consideration of 10*s.*, &c., the said W. Sharp the younger doth by these presents grant and assign unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, *all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of the said W. Fenn, and all such as shall hereafter come into the hands of the said W. Fenn*, or other the agent, deputy, or attorney for the time being of the said W. Sharp the younger to be substituted for the said W. Fenn as hereinafter mentioned, *on account or in respect of the said hereinbefore-mentioned underwriting business, and which according to the terms of the hereinbefore-recited agreements of the 17th of March*, 1857, *of the 1st of November*, 1858, *and of the 2d of the present month of July, respectively, or otherwise, are and will or may become payable to the said W. Sharp the younger;* together with full power and authority to and for the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors or administrators of such survivor, in the name or names and as the attorneys or attorney of the said W. Sharp the younger, to ask, demand, sue for, recover, and receive, and to give effectual receipts and discharges for, the said moneys, proceeds, and premises expressed and intended to be hereby assigned, and every or any part thereof: And the said W. Sharp the younger doth hereby order and direct the said W. Fenn, and other the agent, deputy, and attorney for the time being of the said W. Sharp the younger in the aforesaid business, to pay the said moneys, profits, and premises unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, accordingly, To have and to hold the said moneys, profits, and other the premises hereinbefore mentioned, and hereby granted and assigned, or expressed and intended so to be, unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, In trust, nevertheless, for the said W. Sharp the younger until the said intended marriage between him and the said M. L. P. Chamney shall be solemnized, and, from and after the solemnization thereof, upon the trusts and for the intents and purposes hereinafter declared and expressed concerning the same, that is to say, Upon trust with and out of the moneys and profits arising from the said underwriting business, In the first place, to pay unto the said W. Sharp the elder, by half-yearly payments, on the 1st of January and the 1st of July in every year (and the first half-yearly payment to be made on the 1st of January next after the solemnization of the said intended marriage) the annuity or yearly sum agreed or undertaken to be paid by the said W. Sharp the younger to the said W. Sharp the elder by the said hereinbe-

of Sharp jun., after his marriage, on policies signed in his name by Fenn *under the above agreements; and the defendant, being called upon by Fenn, under the defendant's letter of May 21st, [*628

fore-recited memorandum or writing under the hand of the said W. Sharp the younger, dated the 1st of January, 1859; and, subject and without prejudice to the payment of the aforesaid annuity or yearly sum to the said W. Sharp the elder, upon trust in the next place, with and out of the said moneys, profits, and premises, to pay to the said W. Sharp the younger, by equal half-yearly payments on the days above mentioned (and the first payment thereof to be made on the 1st of January next after the solemnization of the said intended marriage) an annuity or yearly sum of 500*l.* free from all deductions; and also upon trust to pay to him, when and as the same become due, the dividends, interest, and annual proceeds of the aforesaid railway shares, and also the resulting income of the surplus moneys, profits, and premises to be accumulated and invested as hereinafter directed: And, upon further trust to accumulate and invest in manner hereinafter expressed the residue or surplus after the payments aforesaid of the said moneys, profits, and premises hereinbefore assigned, until the same shall amount to or be of the value of 8500*l.* sterling, and shall remain of that amount or value without reduction on account of losses in the aforesaid underwriting business for the full term of two years; and, from and after the time when the said accumulations shall amount to and remain for two years of the amount or value of 8500*l.* without reduction as aforesaid, then upon trust with and out of the proceeds of the said underwriting business to pay unto the said W. Sharp the younger, by such half-yearly payments as aforesaid, an annuity or yearly sum of 750*l.* free from all deductions, in addition to the income of the said accumulations and of the dividends and annual proceeds of the said railway shares, and to accumulate and invest in manner hereinafter expressed the residue or surplus after the payments hereinbefore mentioned of the profits of the said underwriting business until the same shall amount to or be of the value of 8500*l.* sterling, and shall remain of that amount or value without reduction on account of losses as aforesaid for the full term of two years; And, from and after the time when the said accumulations shall amount to and remain for two years of the amount or value of 8500*l.* without reduction as aforesaid, then upon trust to reassign the said moneys and profits arising from the aforesaid underwriting business unto the said W. Sharp the younger, his executors, administrators, and assigns, absolutely: And it is hereby agreed and declared between and by the said parties hereto that the accumulations hereinbefore directed to be made of the proceeds of the said underwriting business shall, at the discretion of the said trustees, or of the survivor of them, his executors or administrators, or of other the trustee or trustees of these presents for the time being, but with the consent of the said W. Sharp the younger during his life, be laid out or invested from time to time in some or one of the public stocks or funds of Great Britain, or in the purchase of shares in the capital stock of the Bank of England or of the East India Company, or of all or any of them, or upon any government or real securities in England or Wales, or upon the security of the bond or bonds of any of the British colonies, or of the bond or bonds, debentures or debenture, or preference or guarantee stock or shares of any railway, dock, or canal company or companies of good repute, and paying or understood to pay dividends out of the bonâ fide profits thereof: And the said W. Sharp the younger doth hereby covenant and agree with the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, that, in case the said intended marriage shall take effect, and in case at any time thereafter before the accumulations hereinbefore directed to be made shall amount to or be of the value of 8500*l.*, and shall continue of that amount or value without reduction as aforesaid for the space of two years, the said W. Fenn or the person for the time being substituted for and acting in his stead as hereinafter mentioned should die or decline or become incapable to act as the agent, deputy, or attorney of and for the said W. Sharp the younger in the management and carrying on in manner aforesaid of his said underwriting business, then and in every such case the said W. Sharp the younger shall and will immediately thereupon engage and appoint some other fit and competent person to act in the same capacity as the said W. Fenn now does as agent for or as the deputy or attorney of the said W. Sharp the younger in conducting, managing, and carrying on his said business of underwriting, as also for the purpose of winding up of the accounts between the said W. Sharp the younger and his previous agent, deputy, or attorney in the said business, to the intent that the said business shall be effectually carried on and the profits thereof paid over in manner aforesaid to the said trustees or trustee of these presents for the time being until the accumulations hereinbefore directed to be made shall amount to or be of the value of 8500*l.* and shall remain of that amount without reduction as hereinbefore mentioned for the space of two years: Provided always, and it is hereby agreed and declared, that, notwithstanding the trusts for accumulation and investment hereinbefore contained, it shall be lawful for the said trustees or trustee of these presents for the time being, at any time or times before

1857, made advances of money to Fenn to a considerable amount to
*629] meet the losses so sustained. The underwriting business was carried on by Fenn as *above mentioned in the name of Sharp

the said accumulations shall amount to or be of the value of 8500*l.*, and shall continue of that amount without reduction as aforesaid for the space of two years, upon the request in writing of the said W. Sharp the younger, and of the said W. Fenn, or of the agent, deputy, or attorney for the time being to be substituted as aforesaid for him in carrying on the said underwriting business, to raise and pay out of the said railway stock, accumulations, and investments, unto the said W. Fenn, or other agent, deputy, or attorney for the time being substituted for him as aforesaid, any sum or sums of money that may from time to time be required to meet emergencies occurring in the said underwriting business: And this indenture also witnesseth, that, in further pursuance of the said hereinbefore-recited agreement, and in consideration of the said intended marriage, it is hereby further agreed and declared between and by the said parties to these presents, that the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors or administrators of such survivor, and other the trustees or trustee of these presents for the time being, shall, after the solemnization of the said intended marriage, stand possessed of and interested in as well the said accumulations hereinbefore directed to be made of the proceeds of the said underwriting business when and so soon as the same shall amount to or be of the value of 8500*l.*, and shall remain of that amount or value without reduction for the period of two years, as hereinbefore mentioned, or, if the said W. Sharp the younger should die before the same accumulations shall reach the said amount or value of 8500*l.*, then of and in the amount actually accumulated at the time of his decease, and of and in the stocks, funds, securities, and investments in or upon which the said accumulations shall or may have been laid out and invested, as also from and immediately after the solemnization of the said intended marriage of and in the aforesaid 1000*l.* London and North Western Railway stock and 500*l.* London and South Western Railway stock, and of and in the interest, dividends, and annual proceeds of the said accumulations, stock, funds, securities, investments, shares, and premises (which are hereinafter called the principal trust premises), upon the trusts and for the intents and purposes, and with, under, and subject to the powers, provisoes, agreements, and declarations hereinafter expressed, declared, and contained concerning the same, that is to say, upon trust in the first place from time to time or at any time or times, whensoever thereunto requested in writing by the said W. Sharp the elder, his executors or administrators, and also by the said W. Sharp the younger, his executors or administrators, to raise by sale or other disposition of a competent part or competent parts of the said principal trust premises, and of the income thereof, any sum or sums of money not exceeding in the whole the sum of 5000*l.* which may be required for the purpose of paying to and satisfying the said W. Sharp the elder, his executors or administrators, such sum or sums of money as he, his executors or administrators, shall or may have paid or become liable or be called on to pay upon or under the said hereinbefore-recited letter or guarantee of the said W. Sharp the elder dated the 21st of May, 1857, or any other like letter or guarantee to be substituted for or in lieu of the same, and shall pay the said sum or sums of money when so raised as aforesaid unto the said W. Sharp the elder, his executors or administrators, accordingly; and, subject and without prejudice to the trusts hereinbefore declared, upon trust with and out of the said principal trust premises to pay during the life of the said W. Sharp the younger, when and as the same shall become payable, the annual premiums necessary to be paid in order to keep on foot the policy of assurance hereinafter assigned or expressed and intended so to be; and upon further trust to pay the remainder of the said interest, dividends, and annual proceeds during the life of the said W. Sharp the younger unto him the said W. Sharp the younger and his assigns, for his and their own use and benefit; and, from and after his decease, upon trust to pay the said interest, dividends, and annual proceeds unto the said M. L. P. Chamney and her assigns, during her life, for her and their own use and benefit; And, from and after the decease of the said survivor of the said W. Sharp the younger and the said M. L. P. Chamney, then, as well in regard of the said principal trust premises as in regard to the interest, dividends, and annual proceeds thereof, in trust for all and every or such one or more of the issue of whatever degree or degrees of the said intended marriage, at such age or ages, or time or times, with such provisions for maintenance, education, and advancement, and, if more than one, in such parts, shares, or proportions, and for such interest or interests, and subject or without being subject to such restrictions, charges, and limitations over, such charges or limitations over being for the benefit of some or one of the said issue, as the said W. Sharp the younger and M. L. P. Chamney by any deed or deeds, with or without power of revocation and new appointment, to be by them duly executed, shall or may at any time or times jointly direct or appoint; and, in default of such joint direction or appointment, and so far as no such joint direction or appointment may extend, then as the survivor of the said W. Sharp the

jun., until February 19th, 1860, when Sharp jun. stopped payment; and on March 29th, 1860, he was made bankrupt.

18. Sharp jun. did not keep any banking account. *Fenn [*630

younger and M. L. P. Chamney after the death of the other of them, by any deed or deeds, with or without power of revocation and new appointment, or by his or her last will and testament in writing, or by any codicil or codicils thereto to be respectively by him or her duly executed, shall or may at any time or times direct or appoint; and, in default of every such direction or appointment as aforesaid, and so far as no such direction or appointment may extend, in trust for all and every the children and child if more than one of the said intended marriage, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age, or marry with the previous consent or subsequent written approbation of her or their parents or parent or guardians or guardian, to be divided among the said children in equal shares or proportions as tenants in common, their respective executors, administrators, and assigns; or, if there should be but one child, then in trust wholly for such one child, his or her executors, administrators, and assigns: Provided always, and it is hereby agreed and declared, that no child to whom or to any of whose issue any part or parts of the said principal trust premises may be appointed by virtue of the powers hereinbefore contained, or either of them, shall be entitled to share in the unappointed part or parts thereof, or in other the trust moneys or funds hereinbefore mentioned, without bringing the parts or shares so appointed to him or her, or to all or any of his or her issue, or the value thereof, into hotchpot, and accounting for the same accordingly, unless in and by the same or any other instrument or instruments made in exercise of the powers aforesaid or either of them a contrary intention shall be declared: Provided also, and it is hereby further agreed and declared, that, after the decease of the survivor of the said W. Sharp the younger and M. L. P. Chamney, and until the whole of the said principal trust premises shall become vested under the trusts or powers hereinbefore contained, it shall be lawful for the said trustees or trustee for the time being to pay and apply at their or his discretion, or otherwise to pay unto the guardian or guardians for the time being of the child or children of the said intended marriage during his, her, or their minority or minorities, all or any part of the interest, dividends, and annual proceeds of the share or respective shares in the said principal trust premises to which such child or children of the said intended marriage shall for the time being be presumptively entitled under the trusts or powers aforesaid, for or towards his, her, or their respective maintenance and education, and, from time to time when and as the said trustees or trustee may think fit, but not otherwise, to invest and lay out the residue (if any) of the said interest, dividends, and annual proceeds, in any of the investments hereinbefore mentioned, so that the same may accumulate, which accumulations shall go in augmentation of the share or shares in the said principal trust premises whence the same shall have respectively proceeded, yet so nevertheless that all or any part of the residue or surplus unapplied in any one or more year or years, whether the same shall or shall not have been invested, may be applied in manner aforesaid in any future year or years: Provided also, and it is hereby agreed and declared, that it shall be lawful for the said trustees or trustee for the time being, at their or his discretion, after the decease of the survivor of the said W. Sharp the younger and M. L. P. Chamney, or in the lifetime of them or the survivor of them, with their, his, or her consent in writing, to raise at once or at several times, and to pay and apply for or towards the preferment or advancement in the world, or otherwise for the benefit of any child or children of the said intended marriage, any sum or sums of money not exceeding in the whole for each such child the value of one moiety of his or her presumptive share under the trusts or powers hereinbefore contained in the aforesaid principal trust premises, the said sum or sums of money to be considered and taken as part of his, her, or their share or respective shares therein, and to be allowed or accounted for accordingly: And it is hereby further declared and agreed, that, in case there shall not be any child of the intended marriage who under the trusts or powers aforesaid shall obtain a vested interest in the whole of the said principal trust moneys, then, after the decease of the said M. L. P. Chamney, and such failure of issue as above mentioned, the said trustees or trustee for the time being shall stand possessed of and interested in the said principal trust premises, and the interest, dividends, and annual proceeds thereof, or so much of the same respectively as shall not have been appointed or raised and applied under or by virtue of any of the powers hereinbefore contained, in trust for the said W. Sharp the younger, his executors, administrators, and assigns: Provided always, and it is hereby further agreed and declared between and by the said parties hereto, that it shall be lawful for the said trustees or trustee of these presents for the time being, and they and he are and is hereby authorized and empowered, at any time or times after the solemnization of the said intended marriage, and after the accumulations hereinbefore directed to be made of the proceeds of the

received and paid all moneys for him in respect of the underwriting business and gave him checks from time to time for such sums as Sharp jun. drew out of the business. These checks were paid

said underwriting business shall amount to the sum of 8500*l.*, upon the request in writing of the said W. Sharp the younger, and for meeting emergencies which may arise in the course of the aforesaid underwriting business, but not for any other purpose, to advance and lend out of the said accumulations, and the stocks, funds, or securities in or upon which the same may be invested, to the said W. Sharp the younger, on the security of his bond, or on such other security as the said trustees or trustee may approve of, any sum or sums not exceeding in the whole the sum of 5000*l.*; and it is hereby further agreed and declared that the said trustees or trustee shall stand possessed of and interested in the sum or sums which may be so advanced and lent to the said W. Sharp the younger as aforesaid, and the interest thereof, and the security or securities for the same, upon and for the same trusts, intents, and purposes as are hereinbefore expressed concerning the said principal trust premises hereby settled, and the interests, dividends, and annual proceeds thereof: Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that it shall be lawful for the said trustees or trustee of these presents for the time being, but during the lives and life of the said W. Sharp the younger and M. L. P. Chamney, and of the survivor of them, with their, his, or her consent in writing, to sell and dispose of, call in, and receive the said railway shares hereinbefore mentioned, as also all or any part or parts of the principal trust moneys, stocks, funds, and securities subject for the time being to the trusts hereby declared, and to invest or lay out the moneys to be produced by any such sale or other disposition, or so to be called in and received as aforesaid, in any of the investments hereinbefore particularized, and so from time to time when and as often as occasion may require or as it may be deemed expedient: Nevertheless, it is hereby further declared that all such new stocks or funds, securities, and investments as above mentioned, and the principal moneys invested therein or thereby secured, and the interest, dividends, and annual proceeds thereof respectively, shall be held and applied upon, for, and to the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisoes, agreements, and declarations as are hereinbefore declared, expressed, and contained, of or concerning the said principal trust premises hereby settled, and the interest, dividends, and annual proceeds thereof: Provided also, and it is hereby further agreed and declared, that it shall be lawful for the said trustees or trustee of these presents for the time being, at any time or times during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with their, his, or her consent in writing, to call in, receive, sell, transfer, and dispose of all or any part or parts of the said principal trust premises hereby settled, and to lay out the moneys to be so called in, received, or to be produced by any such sale or other disposition as aforesaid, in the purchase of any freehold or copyhold or customary messuages, lands, or tenements in England or Wales, but not in Ireland, held for an estate of inheritance in fee simple or of the nature thereof, or of any leasehold messuages, lands, or tenements in England or Wales, but not in Ireland, held for a life or lives, or for years, customarily renewable, or for any term or terms of years certain whereof not less than sixty shall be to come and unexpired at the time of such purchase or purchases being made, or in the purchase of messuages, lands, or tenements situate as aforesaid of all or any of the aforesaid tenures, the said messuages, lands, or tenements to be conveyed, surrendered, or assigned respectively to the said trustees or trustee for the time being, their or his heirs, executors, administrators, and assigns, according to the nature of the estates or interests therein, and to be held by them or him upon trust during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with such their, his, or her consent as aforesaid; and, after the decease of the survivor of them, then at the discretion of the said trustees or trustee for the time being to sell and dispose of the said messuages, lands, or tenements which shall have been so purchased as above mentioned, at such time or times, in such manner, and for such price or prices in money, as shall or may be deemed expedient or reasonable; and, as to the moneys arising from or by such sale or sales, upon trust to invest and apply the same (after payment of the expenses attending the said sale or sales) in such manner and to such intents and purposes as the money laid out in the purchase of the messuages, lands, or tenements so sold would have been invested and have been applicable in case such purchase or purchases had not been made; and also upon trust in the mean while until such messuages, lands, or tenements shall be resold, to apply the rents and profits thereof in the manner and to the purposes hereinbefore declared with regard to the interest, dividends, and annual produce of the principal trust premises laid out in such purchase or purchases as aforesaid,—it being the intent of the said several persons parties to these presents that all messuages, lands, and tenements which shall or may be purchased under the authority of this present power shall be

by Sharp jun. into the defendant's banking account with *Hankey & Co., on whom the defendant allowed him to draw checks until November, 1859, when the defendant put a stop to his son's drawing checks. [*631

considered as money, and be subject to such and the same trusts, powers, provisoes, and declarations as the money laid out in the purchase thereof would have been subject to if the same had not been so invested and applied: Provided also, and it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees of these presents for the time being (but during the lives of the said W. Sharp the younger and M. L. P. Chamney, and the life of the survivor of them, with their, his, or her consent in writing) to demise or lease all or any part of the messuages, lands, or tenements which shall or may be purchased in virtue of the power lastly hereinbefore contained, in the mean time and until the same shall be resold pursuant to the trust for that purpose also above expressed, to any person or persons for any term or number of years not exceeding twenty-one years in possession, and not by way of future interest, so that there be reserved in every such demise or lease the best or most improved yearly rent that can be reasonably obtained for the tenements to be thereby demised, and so that the lessee or lessees be not made dispunishable for waste by any words to be therein contained: And this indenture further witnesseth, that, in further pursuance of the said hereinbefore-recited agreement, and for the considerations hereinbefore expressed, the said W. Sharp the younger doth by these presents grant, bargain, sell, and assign unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, all that policy or instrument of assurance under the hands of two of the trustees of the London Life Association for Assurance on Lives, bearing date the 24th of June, 1859, and numbered 10617, second series, and also the principal sum of 3000*l.* thereby assured to be paid out of the funds of the said association unto the executors, administrators, or assigns of the said W. Sharp the younger within three calendar months after satisfactory proof shall have been made according to the rules and practice of the said association of the death of the said W. Sharp the younger, and all such other sums of money (if any) which by way of bonus or otherwise shall or may become payable or be recoverable under or by virtue of the said policy, and all the right, title, interest, property, benefit, claim, and demand whatsoever, both at law and in equity, of the said W. Sharp the younger into, upon, or out of the same policy, money, and premises, together with full power and authority to and for the said W. Sharp the elder and John Donnison, and the survivor of them, and the executors and administrators of such survivor, and their or his assigns, in the names and as the attorneys or attorney of the executors or administrators of the said W. Sharp the younger, or otherwise howsoever, to ask, demand, sue for, recover, receive, and take, and to give effectual receipts and discharges for, the said principal sum of 3000*l.*, and other the moneys to become payable or recoverable by virtue of or under the said policy of assurance, or any of them, or any part or parts thereof, to have and to hold the said policy of assurance, moneys, and other the premises lastly hereinbefore mentioned, and hereby granted and assigned, or expressed and intended so to be, unto the said W. Sharp the elder and John Donnison, their executors, administrators, and assigns, absolutely, nevertheless, in trust for the said W. Sharp the younger, his executors, administrators, and assigns, until the said intended marriage between him and the said M. L. P. Chamney shall be solemnised, and, from and after the solemnisation thereof, upon the trusts and for the intents and purposes hereinafter expressed or referred to concerning the same (that is to say), in case the said M. L. P. Chamney should die in the lifetime of the said W. Sharp the younger, without leaving any child of the said intended marriage her surviving, and without having had any child who under the trusts hereinafter declared by way of reference shall have obtained or shall afterwards obtain a vested interest in the moneys to be recoverable under or by virtue of the said policy of assurance, in trust to assign or transfer the said policy, moneys, and premises unto the said W. Sharp the younger, his executors, administrators, and assigns, for his and their own absolute use and benefit; but, in case the said M. L. P. Chamney, or any child of the said intended marriage, should survive the said W. Sharp the younger, or if any such child should previously to the decease of the said W. Sharp the younger have obtained a vested interest in the moneys to become payable or recoverable under or by virtue of the policy of assurance, then and in any such case, upon trust when and so soon as the said principal sum of 3000*l.* assured by the said policy shall become payable, upon trust to apply for and obtain payment of the said 3000*l.*, and all other moneys (if any) which may be payable or be recoverable by virtue of or under the said policy; and, after deducting the expenses (if any) incurred in obtaining the payment thereof, in trust to lay out and invest the moneys so obtained and received (but, in the lifetime of the said M. L. P. Chamney, with her consent in writing) in or upon any of the stocks, funds, securities, or other

19. Fenn drew his salary out of the funds of the underwriting business.

*632] *20. The first half-yearly payment of the annuity of 500*l.* a year secured to the defendant by the said marriage settlement

investments hereinbefore mentioned; and it is hereby further agreed and declared that the said trustees or trustee of these presents for the time being shall stand possessed of and interested in all and singular the said trust moneys, stocks, funds, securities, and principal trust premises last mentioned, and of and in the interest, dividends, and annual proceeds thereof, upon and for such and the same trusts, and with, under, and subject to such and the same powers, provisoes, agreements, and declarations as are hereinbefore declared, expressed, and contained of and concerning the principal trust moneys, stocks, funds, securities, railway shares, and premises first hereinbefore mentioned and hereby settled, and the interest, dividends, and annual proceeds thereof, or such of the said trusts, powers, provisoes, agreements, and declarations as shall at the time of the decease of the said W. Sharp the younger be subsisting, undetermined, and capable of taking effect, and of being performed and exercised respectively: Provided also, and it is hereby further agreed and declared, that the receipt and receipts in writing of the trustees or trustee for the time being acting in the execution of the trusts or powers hereinbefore contained, shall be good and sufficient as a discharge or discharges for all or any sum or sums of money payable or to be paid to them or him under or by virtue of these presents, or upon or for any of the trusts or purposes herein expressed, and that the person or persons to or for whom the same shall be given shall not be obliged to see to the application or be answerable for the misapplication of the moneys therein respectively expressed to be received, or any part thereof respectively: Provided also, and it is hereby further agreed and declared between and by the said parties to these presents, that, in case the said trustees hereinbefore named, or any of them, or any future trustee or trustees to be appointed as hereinafter mentioned, should die or go to reside abroad, or be desirous of being discharged from, or refuse or become incapable to act in, the execution of the trusts and powers hereby created, before the said trusts and powers shall be fully executed and performed, then and so often as the same shall happen it shall be lawful for the said W. Sharp the younger and M. L. P. Chamney, or the survivor of them, during their, his, or her lives or life, and, after the decease of the survivor of them, for the surviving or continuing trustees or trustee for the time being, or the executors or administrators of the last surviving or of any deceased trustee, or for the retiring trustees if all the trustees for the time being retire together, or for the last acting trustee, on his retiring, by any deed or deeds, to be by them, him, or her respectively duly executed, to nominate, substitute, or appoint any other fit person or persons to be a trustee or trustees in the place or stead of the trustee or trustees so dying, or going or gone to reside abroad, or desiring to be discharged, or refusing or becoming incapable to act as aforesaid; and that, when and so often as any new trustee or trustees shall be appointed as above mentioned, all the said trust premises subject for the time being to the trusts hereby declared, shall be thereupon assigned or transferred and assured in such manner and so that the same may be legally and effectually vested in the continuing former trustees or trustee of these presents and such new trustee or trustees jointly, or, if there be no such continuing former trustee, then in such new trustees solely, upon and for the several trusts, intents, and purposes, and with and subject to the several powers, provisoes, agreements, and declarations hereinbefore declared or expressed and contained of or concerning the said trust premises, or such of them as shall be then subsisting or capable of taking effect or of being exercised; and that such new trustee or trustees as above mentioned either before or after any assignment or transfer of the said trust premises shall have, and may exercise and concur in exercising, all the same powers and authorities and as fully and effectually as if he or they had been originally appointed a trustee or trustees of these presents, in the room of the trustee or trustees in whose place he or they respectively shall or may be substituted: Provided also, and it is hereby further agreed and declared that the said trustees hereinbefore named, and all future trustees to be appointed as aforesaid, their respective heirs, executors, and administrators, shall be chargeable only for such moneys as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding their joining in any receipt for the sake of conformity; and that each of them shall be answerable for his own acts and wilful defaults only, and in no case for involuntary losses, and in particular shall not be answerable or accountable for any moneys which in pursuance of or under the trusts, powers, or authorities hereinbefore contained, shall or may be paid or advanced by the said trustees or trustee for the time being to the said W. Fenn, or other the agent, deputy, or attorney for the time being of the said W. Sharp the younger in his said business of underwriting, or to the said W. Sharp the younger himself, for the purposes of the said business, nor for the loss or avoidance

became due to the defendant on the 1st of January, 1860, and was paid to the defendant by Sharp jun. on the 7th of March, 1860, but has since *been claimed by the assignees under the son's bankruptcy from the defendant, as an undue preference, and repaid [*633 by him.

21. Sharp the younger, between the date of the said settlement and his bankruptcy, drew various sums of *money out of the underwriting business on account of the annuity of 500*l.* secured to [*634 him by the said settlement.

22. On the 22d of December, 1859, the plaintiffs effected a marine policy of assurance at Lloyd's in the *usual way, for the sum [*635 of 2700*l.* on the ship "Shepherdess," for twelve calendar months, in any trade, and from and to any port or ports, commencing sailing from Whampoa, at 8 guineas per cent. premium. This policy was subscribed by several underwriters for *various sums, and, [*636 amongst others, by a clerk in the name of Sharp jun., before he stopped payment, for 100*l.* A loss afterwards occurred upon this policy to the plaintiffs by the perils insured against, to the amount of 100*l.* per cent.: and it was agreed that the *underwriters of [*637 the said policy are liable to the plaintiffs thereon to that amount.

23. The plaintiffs were wholly ignorant of the aforesaid arrangements and dealings between the defendant, his son, Fenn, and the committee of Lloyd's, and also of the said marriage settlement.

*24. In the month of September, 1861, the plaintiffs proved [*638 their claim under the son's bankruptcy. At the time of such proof, neither of the plaintiffs was aware of the aforesaid arrangements and dealings.

25. The plaintiffs contended that the defendant, by *the effect [*639 of the instruments and facts above mentioned, became a partner or a principal in the underwriting business carried on in his son's name as above mentioned, and, as such, a party to the said policy, and liable to pay to the plaintiffs the loss sustained on *the said [*640 policy in respect of the sum of 100*l.* underwritten in the son's name as aforesaid. The defendant contended the contrary. It was agreed that the Court should draw any reasonable inferences of fact.

26. The question for the opinion of the Court was, *whether [*641 the defendant was or was not liable on the said policy, as a partner with his said son.

27. If the Court should be of opinion that the defendant was liable, then it was agreed that judgment should be entered for the plaintiffs for the sum of 100*l.* *If the Court should be of the contrary [*642 opinion, then it was agreed that the verdict and judgment should be entered for the defendant on the issues joined on the second and sixth pleas.

of the said policy of assurance hereinbefore assigned or expressed and intended so to be, or of the moneys thereby assured, by reason of the non-payment of any of the annual premiums to be paid for keeping the same on foot; and that the said present and future trustees, their respective heirs, executors, and administrators, shall and may, out of the moneys which shall come to their respective hands by virtue of these presents, retain to and reimburse themselves respectively all such reasonable costs and expenses as they shall or may respectively incur in or about the execution of the trusts hereby in them reposed. In witness," &c.

*643] *J. Brown*, Q. C. (with whom was *Bovill*, Q. C.), for the plaintiffs.(a)—The defendant, it is submitted, was a *partner *644] with his son. The effect of making the profits of the business the subject of the marriage-settlement, was, to make the trustee a partner, even if he were a bare trustee. The memorandum of the 1st of January, 1859, in itself would constitute a partnership: but, *645] *when we come to the marriage settlement, the thing assumes a very definite shape; all the profits already accrued or thereafter to accrue from the underwriting business were assigned to the defendant and Donnison as trustees. In Wightman *v.* Townroe, 1 M. & Selw. 412, where executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, it was held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names were not added to the firm, but the *646] trade was carried on by the other partners under *the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. Le Blanc, J., says: "It seems to me that the executors, by embarking the property in trade in the first instance, contracted a responsibility in a Court of law, which their subsequent application of the profits to purposes not of personal benefit, cannot afterwards vary." A similar decision was come to in Ex parte Garland, 10 Ves. 110. It is a clear principle in the law of partnership, that one who contracts for a share of profits is liable to contribute to losses. The rule has been so laid down in a long series of cases. In Ex parte Wilson, In re Colbeck, Buck, B. C. 48, it was held, that, if a retiring partner assign all his share in the concern to two continuing partners, upon trust to pay him an annuity for his life, subject to an abatement or enlargement with the fluctuation of the profits of the trade, that will not with reference to creditors determine the partnership. In Ex parte Hamper, 17 Ves. 403, 404, Lord Eldon says: "The cases have gone farther to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but, *if he has a specific interest in the profits themselves, as profits, he is a partner.*" Again at p. 412, he further says: "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but, if he agrees for a part of the profits, *647] as such, giving him a right to an *account, though having no property in the capital, he is as to third persons a partner; and

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the facts show that the defendant was a partner as to third persons in the underwriting business carried on in his son's name:

"2. That the defendant was liable to the plaintiffs on the policy in question subscribed in the son's name, as a partner with him; and that the plaintiffs are entitled to recover the amount insured from the defendant."

in a question with third persons no stipulation can protect him from loss."

Lush, Q. C. (*Mellish*, Q. C., and *Sir G. Honyman* were with him), for the defendant.(*a*)—It is sought to fix the defendant as a partner in the business carried on by his son, by a reference to the agreement of the 1st of January, 1859, and the marriage settlement, taken together. The agreement was, to pay the defendant 500*l.* a year for three years, in consideration of his guaranteeing in case of losses to the extent of 5000*l.*, and that, if at the end of the three years the business should be found to have produced a profit of more than 2000*l.* a year, the annuity was to be increased. That was not an agreement for a share of the profits of the business. [MONTAGUE SMITH, J.—It would have been much the same if the annuity had been measured by the amount of profits of another man's business.] Precisely so. Then, does the marriage settlement make the father a partner? It is said that not only does it make the father, but also the co-trustee, a partner. The business, however, is not transferred to them; but only the railway stock, moneys in hand, and all the moneys, earnings, profits, and emoluments which should thereafter come to the hands of Fenn *on account or in respect of the underwriting business. The [*648 trustees had no power to interfere with the business. [MONTAGUE SMITH, J.—Would not the father be entitled in equity to an account of the profits?] It is submitted not. By the agreement of the 17th of March, 1857, the business was to be entirely under the control and management of Fenn. If the agreement of the 1st of January, 1859, did not make the father a partner, the settlement clearly did not. There is nothing in any of the trusts to impose upon the trustees any such liability as is sought to be inferred from the deed. In Hickman *v.* Cox, 18 C. B. 617 (E. C. L. R. vol. 86), A. and B., who carried on the business of iron-masters in copartnership, by a deed purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sums therein mentioned, and who should execute the deed, of the third part,—reciting that the said A. and B. were indebted to the several persons parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors,—assigned the works and all their property and effects to trustees, upon trust, amongst other things, *to carry on the business* under the name of "The Stanton Iron Company," and *out of the profits* to pay interest on mortgages, &c., and to "*pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts.* And this Court held, that, under this deed, the *creditors* executing it became liable *as partners* for debts contracted by the trustees in carrying on the

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That, upon the facts and documents set out in the special case, the defendant is not liable as an underwriter on the policy:

"2. That the facts do not show that the defendant was a partner with his son in business, so as to make him liable for the loss:

"3. That it appears by the case that the plaintiffs were not aware of the acts alleged to constitute a partnership, and therefore are not entitled to rely on any ostensible partnership."

trade. On appeal to the Exchequer Chamber, that Court was equally
*649] divided in opinion,—Coleridge, J., Erle, J., and *Crompton, J., agreeing with the Court below; Martin, B., Bramwell, B.. and Watson B., thinking the decision of this Court wrong: see 3 C. B. N. S. 523 (E. C. L. R. vol. 91). The House of Lords, however, held that the deed did *not* constitute the creditors partners, so as to become liable for debts contracted by the trustees in carrying on the business: see Wheatcroft and Cox v. Hickman, 9 C. B. N. S. 47 (E. C. L. R. vol. 99). 8 House of Lords Cases 268. The liability of a partner in respect of contracts made by the firm is there put upon the true ground, viz. that of *agency*. Lord Cranworth there says 9 C. B. N. S. 90 (E. C. L. R. vol. 99): "The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind them all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners; and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some of them only shall enter into particular contracts, or enter into any contracts, or that, as to certain of their contracts, none shall be liable except those by whom they are actually made: but with such private arrangements third persons dealing with the firm, without notice, have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade." Again, at p. 95, his Lordship says: "I can find no case in which a person has been made liable as a dormant or sleeping partner, in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting
*650] it, and when therefore he would stand in the *position of principal towards the ostensible members of the firm as his agents. This was certainly the case in Waugh v. Carver, 2 H. Bl. 235. Each firm was carrying on business on account, not only of itself, but also of the other firm: this, therefore, made each firm the agent of the other. The case of Bond v. Pittard, 3 M. & W. 357,† could admit of no doubt. The question was, whether G. F. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had agreed to become partners on a stipulation that P. H. Watts should always receive 300*l.* yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners: but the Court held the contrary. Each of them worked for the common benefit of both: and each of them therefore acted as agent for the other. The produce of the labour of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt. A similar principle explains and justifies the decision of the Court of Common Pleas in Barry v. Nesham, 3 C. B. 641 (E. C. L. R. vol. 54). The question was whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a newspaper. It is clear that Lowthin was conducting the business for the

common benefit of both, subject to the private arrangements as to the shares they should separately be entitled to. Lowthin was therefore clearly the agent of Nesham." Tried by that test, what is there here to show that the underwriting business was being carried on for the benefit of this defendant? [BYLES, J.—We are to draw any reasonable inferences of fact. If we think that the substance of the arrangement makes the defendant a partner, we are bound so to decide. ERLE, C. J., *referred to Courtenay *v.* Wagstaff, 16 C. B. N. S. 110 (E. C. L. R. vol. 111). MONTAGUE SMITH, J.—It appears [*651 that all the moneys received in the business were paid into the father's banking-account.] The accounts being all kept by Fenn, the son did not require himself to keep a banking-account for the purpose of this business. The business began in 1857; it was not until the 1st of January, 1859, that the defendant took the agreement to receive 500*l.* a year. If such an arrangement as this enures as a partnership, no security can be taken for the repayment of advances out of the profits of a business. [ERLE, C. J.—The difficulty is, that this is a bargain to receive the proceeds of future contracts.] The true question is, as in Wheatcroft *v.* Hickman, 9 C. B. N. S. 47 (E. C. L. R. vol. 99), 8 House of Lords Cases 268, whether the business carried on is the business of the person who is sought to be charged, and the person carrying it on is doing so as his agent. None of the cases cited on the other side have any application. In Wightman *v.* Townroe, 1 M. & Selw. 412, the executors had taken to and were carrying on the business for the benefit of an infant. Lord Justice Knight Bruce so explains that case in Labouchere *v.* Tupper, 11 Moore's P. C. 198, 221, where he says,—"The executor of a trader carrying on the trade after his death, though doing so avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after his death, whether he is entitled or not entitled to be wholly or to any extent indemnified by the testator's personal estate, and whether it is sufficient or insufficient for the purpose: nor does the propriety of his conduct, as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. The latest authorities on the point are, we conceive, to this effect, *and appear to us preponderant and correct. A sufficient [*652 number of these authorities, including Ex parte Garland, 10 Ves. 110, Ex parte Richardson, 3 Madd. 138, and Wightman *v.* Townroe, 1 M. & Selw. 412, were cited at the bar during the argument." Kilshaw *v.* Jukes, 32 Law J., Q. B. 216, is also a cogent authority to show that no partnership was created here. There, A., an ironmonger, having supplied ironmongery to the amount of 189*l.* to B. and C., who were builders, agreed to join them in the purchase of some land for building, on the conditions that B. and C. should build the houses, A. supplying the ironmongery required, and that on the completion and sale of the houses A. should be paid the 189*l.* and the price of the ironmongery, and no more, and that, if no profit was realized, A. should be a loser: an agreement was accordingly entered into by all three with the landowner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the buildings, and the three

being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three or as they should direct. B. and C. having ordered timber of the plaintiff, it was supplied on their credit (the plaintiff being ignorant of A.'s having any interest in the building), and it was used on the building. The Court held (Wightman, J., dissenting) that A. was not jointly interested with B. and C. in such a way as to make him a partner and liable for the timber.

Brown was not called upon to reply.

ERLE, C. J.—I am of opinion that our judgment in this case ought to be for the plaintiffs. My judgment *turns upon the operation of the deed of the 19th of August, 1859, the marriage settlement. That, I think, made the defendant liable as a partner, as giving him an interest in the business which was to be carried on. It is very material to consider what was the nature of the business. There was no place of business; and no stock in trade; but only a contract between William Sharp the younger and Fenn, by which it was agreed that the underwriting business should be carried on by them under the guarantee of the father (the now defendant) to the extent of 5000*l.* if losses to that amount should be called for; and, if no losses were incurred, the proceeds were to be paid over by Fenn (by whom the business was to be carried on and the accounts kept) to Sharp the younger. That was the business which was the subject of the settlement. In consideration of his guarantee, the defendant was to receive 500*l.* a year out of the profits. By the settlement, Sharp the younger assigned to the defendant and Donnison, their executors &c., "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of the said W. Fenn and all such as shall hereafter come into the hands of the said W. Fenn or other the agent, deputy, or attorney for the time being of the said William Sharp the younger to be substituted for the said W. Fenn as hereinafter mentioned, on account or in respect of the said hereinbefore-mentioned underwriting business, and which according to the terms of the said hereinbefore-recited agreements of the 17th of March, 1857, of the 1st of November, 1858, and of the 2d of the present month of July respectively, or otherwise, are and will or may become payable to the said William Sharp the younger." The result of that assignment, with the accompanying power of attorney, was, to hand over to the defendant and Donnison substantially the entirety of the business. Every thing that *could come from the business became the property of the defendant and Donnison, in trust, as to 500*l.* thereof, to pay the defendant's annuity. Assuming that the yearly earnings of the business were 500*l.* only, and losses should be incurred, the result would be that every shilling of the proceeds would be handed over to the defendant, and nothing would remain whereout to pay losses. The deed is to be construed with reference to the business to which it related. It was no doubt intended to be a real transaction. The mistake which the defendant made, was, that he calculated upon the business being profitable; not taking into account the possibility of losses occurring and of the concern thus becoming a losing one. An arrangement by which all the proceeds of a business are to be handed over to a third person certainly looks suspicious on the face of it. No fraud is suggested here: but still the whole gross proceeds of the business

*653]

*654]

passed by the deed to the trustees until the 500*l.* a year was paid to the defendant. The result seems to me to be, that the defendant became responsible as a principal. I do not place so much reliance upon the antecedent agreement as upon the deed. If this had been the case of an ordinary trading concern, and the whole stock had been transferred, it would have been beyond argument. Here the whole proceeds of the business pass, including the profits, eo nomine. That distinguishes this case from those where an annuity has been agreed to be paid in proportion to the profits of a business. The ground upon which the decision of the House of Lords in Wheatcroft *v.* Hickman proceeded seems to me to be a sound and rational one. It was admitted there that for debts contracted by the trustees they would be liable. Here the claim is against one of the trustees to whom all the proceeds of the business,—a very peculiar one,—are in terms conveyed. Upon the whole, I feel bound to come to the *conclusion that the defendant has by the contract he has entered into made himself liable for the debts of the concern. [*655

BYLES, J.—I am of the same opinion. It is not necessary to consider here whether or not a mortgagee of the profits of a business becomes a partner. We are empowered and bound to draw inferences of fact: and the question is, whether upon the facts stated in this special case we do not see an obvious intention to evade the law of partnership, as, no doubt, a man may do without any reflection upon his character or honour. That that intention was present to the mind of this defendant, is clear from two or three passages. One is in the memorandum of agreement of the 1st of January, 1859,—a very carefully worded passage: "If at the end of three years from the date hereof, it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, then and in that case the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years." The person who drew that document was evidently desirous to guard against a partnership; for, the concluding sentence of the memorandum is as follows,—"Moreover, in no case are you to be considered as a partner with me in the said business of an underwriter." All notion of a participation in *profits* is carefully avoided. When we come to the marriage settlement, we find an express assignment to the trustees of "all and singular the sums of money, earnings, *profits*, and emoluments which are now in the hands of Fenn, *and all such as shall hereafter come into the hands of Fenn*, on account or in respect of the said underwriting business." Here is an assignment of profits by name. Then, when the accumulated *profits shall have reached 8500*l.*, and continued at that amount without reduction for two years, the trustees are to reassign to Sharp the younger "the said moneys and *profits* arising from the aforesaid underwriting business." When the whole deed is looked at, it amounts in substance to this, that the first 500*l.* of the yearly profits of the concern are to go into the pocket of the defendant,—being 10 per cent. on a sum not *advanced*, but merely guaranteed. I must confess, that, if I were sitting as a juryman, I should have no hesitation in coming to the conclusion that [*656

the real substance of the bargain was, for a share of the profits, and nothing else.

MONTAGUE SMITH, J.—I am of the same opinion. If the case had rested on the agreement of the 1st of January, 1859, I should not have thought that any partnership was created. That is a mere agreement or promise to pay the defendant 500*l.* a year, and a further sum in the event of the profits of the business reaching a given amount. But the marriage settlement gives the defendant a right to receive the whole "earnings, profits, and emoluments" of the business,—at once and absolutely to take the whole of the net profits of the business, eo nomine. It gave him all the rights of a partner, including a right to an account. If he were not a partner, the effect would be, that the whole fund applicable to the payment of losses would be entirely taken away. If an agreement to receive half the profits of a concern makes a man a partner, how is he less a partner if he stipulates to receive the whole? By this deed the defendant is to receive the profits of the business as profits, and he thereby deprives the creditors of the fund out of which losses, if any, were to be paid. All the usual tests of a partnership are satisfied.

Judgment for the plaintiffs.

---

*657] *FRANCES MATTHEY, Administratrix of FREDERICK MATTHEY deceased, *v.* WISEMAN and Another.

May 16.

1. The custom of foreign attachment in the city of London does not warrant proceedings against one who at the time of their commencement was dead.

2. Held, therefore, that a judgment and execution and payment by the garnishees in a suit so commenced in the Mayor's Court cannot be set up by them as an answer to a claim against them by the personal representative of the deceased, for a debt due to him in his lifetime, notwithstanding that the letters of administration were granted before execution had, and that (as was suggested) by the custom she might have appeared in the Mayor's Court and dissolved the attachment.

3. Westoby *v.* Day, 2 Ellis & B. 605, distinguished.

THIS was an action by the plaintiff, administratrix of Frederick Matthey, deceased, for money payable to Frederick Matthey, the intestate, in his lifetime, for money received by the defendants for the use of the said Frederick Matthey, and for money found due from the defendants to the said Frederick Matthey on accounts stated between them, and for money payable by the defendants to the plaintiff as administratrix, for money received by them for the use of the plaintiff as administratrix: Claim, 3000*l.*

The defendants pleaded,—thirdly, that the plaintiff, as such administratrix as aforesaid, ought not further to maintain her action against the defendants, because they said, that the city of London now is, and immemorially has been an ancient city, and that there is, and immemorially has been, a custom therein, that, if any person affirms or hath affirmed a plaint in debt in the Court of Her present Majesty or her predecessors, Kings or Queens of England, held or to be held before the mayor and aldermen of the said city for the time being, in the chamber of the Guild Hall of the said city, within the said city,

according to the custom of the said city, and upon such plaint it be or hath been commanded by the Court to any of the serjeants-at-mace and ministers of the said Court to summon such person named defendant in such plaint to appear in the same Court to answer the plaintiff in such plaint; and if it is or has been certified and returned by such serjeant-at-mace and minister of the Court that the defendant in such plaint has or had nothing within the said city, or the liberties thereof, whereby he can or *could be summoned, nor is nor was to be found within the city, and such defendant at that Court, being [*658 solemnly called, makes or has made default, and in the same Court it is or has been alleged by the plaintiff in the plaint that any other person owes or has owed to any such defendant any sum of money amounting to the debt in such plaint specified, or any part thereof, then, at the petition of such plaintiff made to the same Court for process, according to the custom of the said city, that is to say, that such person so owing or having owed such debt as aforesaid, being found within the jurisdiction of the said Court, may or might be warned by the said serjeant-at-mace or minister of the said Court not to part with such debt or sum of money so being in his hands and custody, without license of the said Court, but the same in his hands and custody keep so that the said defendant might be attached thereby, that he might appear in the same Court to answer the said plaintiff in the plea in such plaint specified,—it is and has been commanded by the Court to one of the serjeants-at-mace and a minister of the Court, to attach such defendant in such plaint by such sum of money, so being in the hands or custody of such other person, according to the said custom, so that such defendant might appear at the then next Court to be holden before the said mayor and aldermen, in the chamber of the Guildhall, to answer the plaintiff in the plea in such plaint specified; and then, if such serjeant-at-mace and minister of the Court return and certify to such Court such defendant to be attached according to the said custom, by such sum of money, so being in the hands or custody of such other person, to be defended and kept so that such defendant in such plaint named might appear at the same or the then next Court holden or to be holden, to answer such plaintiff in the plea in such plaint *specified: and if the defendant at that and three other Courts then next severally holden or to be holden before the [*659 mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, being solemnly called, does not appear, but makes default, and such four defaults according to the custom of the said city are recorded against such defendant at such four Courts after such attachment made; and if such plaintiff in such plaint named, at every such four Courts, in his own person or by his attorney appear and offer himself against such defendant in the plea in such plaint specified, according to the custom of the said city, then, at the last of the said four Courts, or at any Court holden or to be holden after such four defaults recorded, at the petition of such plaintiff in such plaint named made to the Court, it is and has been used for the Court to command such or any other serjeant-at-mace and minister of the Court to warn such other person, so being found within the said city, according to the custom of the said city, to be and appear at any Court afterwards to be holden before the mayor and aldermen of the said city, to show

if anything he has or knows to say for himself why such plaintiff in such plaint ought not to have execution of such sum so attached as aforesaid; and if at such Court such serjeant-at-mace return and certify such other person in whose hands such sum of money is or has been attached to be warned, according to such custom, to be and appear in the same Court to show such cause, and if such person so warned, being solemnly called at such Court, do not appear or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed for such Court to award such plaintiff to have execution of such sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such sum so
*660] *attached extends or has extended to satisfy, by sufficient pledges to be found and given by such plaintiff in such plaint named in the same Court, according to such custom, to restore to such defendant such sum of money so attached, if such defendant within a year and a day thence next ensuing come or has come into the Court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and, that, after such pledges found and execution had of such sum so in the hands and custody of such other person attached and defended by the plaintiff in such plaint named, such other person in whose hands or custody such sum is or has been attached is or has been discharged against such defendant of the sum so attached and had in execution, and such defendant in such plaint named is or has been discharged against the same plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remains in force and effect, not revoked or disproved by such defendant; and, if such sum of money so attached and defended and had in execution amount not nor has amounted in the whole to the sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said Court, is, and from time immemorial has been, used and accustomed to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded: Averment, that the said custom, and all other customs of the said city obtained and used in the said city during all the time aforesaid, were by authority of a parliament holden in the seventh year of the reign of His Majesty Richard the Second, late King of England, ratified and confirmed to the then mayor and commonalty of the said city, and their
*661] *successors: That C. Kelson, V. B. Tritton, E. P. Alderson, P. G. Chapman, and E. T. Hankey, trading under the style or firm of Kelson, Tritton & Co., and hereinafter called Messrs. Kelson, Tritton, & Co., before the commencement of this action of the plaintiff in this suit against the defendant in this suit, to wit, on the 3d of March, 1863, in their own proper persons came into the Court of our Sovereign Lady the Queen there, before the mayor and aldermen of the said city of London, in the chamber of the Guildhall of and within the said city, according to custom, such chamber then and still being in and parcel of the said Guildhall, and then and there affirmed a certain plaint against Frederick Matthey, now deceased, in a plea of debt upon demand of 2183*l.* 17*s.* 9*d.* of lawful money of Great Britain; and the same Messrs. Kelson, Tritton & Co., then in the same Court, accord-

ing to such custom, found pledges to prosecute such suit, to wit, John Doe and Richard Roe, and then and there appointed in their stead J. M. Pearson, their attorney against the said Frederick Matthey in the plea of the said plaint, according to such custom, and it was granted to them, &c.: whereupon, at the petition of the said Messrs. Kelson, Tritton & Co. then and there made to such Court by their said attorney, and by virtue of such plaint, it was then and there commanded by the said Court to C. Fitch, then being one of the sarjeants-at-mace of such Court, that he, according to such custom, should summon by good summoners the said Frederick Matthey to appear at the same Court so holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, to answer the said Messrs. Kelson, Tritton & Co. in the plea in such plaint specified, and that the said C. Fitch should return and certify what he should do by virtue of the said precept; and afterwards, at the same Court, the *said C. Fitch, according to such custom, returned and certified to the same [*662 Court that the said Frederick Matthey had nothing within the said city, or the liberties thereof, whereby he could be summoned, nor was he to be found within the same; and thereupon the said Frederick Matthey was then and there at the same Court solemnly called, and did not appear, but made default; and thereupon afterwards, and before the commencement of this action, to wit, on the day and year last mentioned, at the same Court, it was alleged by the said Messrs. Kelson, Tritton & Co., by their said attorney, that the said James Wiseman and William Wilson, the now defendants, owed to the said Frederick Matthey 2183*l.* 17*s.* 9*d.* in moneys numbered, as the proper moneys of the said Frederick Matthey, and then detained the same in their hands and custody: That they the now defendants, at the time when it was by the said Messrs. Kelson, Tritton & Co., by their said attorney, so alleged as last aforesaid, were and were found within the said city, and within the jurisdiction of the same Court; and thereupon the said Messrs. Kelson, Tritton & Co., by their attorney, then and there prayed process, according to such custom, to attach the said Frederick Matthey by the said 2183*l.* 17*s.* 9*d.* so being in the hands and custody of the now defendants, so that the said Frederick Matthey might appear at the next such Court to be held before the mayor and aldermen of the said city, in the chamber of the Guildhall of and in the said city, to answer the said Messrs. Kelson, Tritton & Co. in the plea in such plaint specified: whereupon, at their said petition, it was then and there commanded by such Court, before the commencement of this action, to the said serjeant-at-mace and minister of the said Court, that he, according to such custom, should attach the said Frederick Matthey by the said 2183*l.* 17*s.* 9*d.* so being in the *hands and custody of the now defendants as aforesaid, and the same in their hands and custody defend and keep, according [*663 to such custom, so that the said Frederick Matthey might appear at the then next such Court to be holden before the said mayor and aldermen of the said city, in the Guildhall of the said city, to wit, on the 4th of March then next, according to such custom, to answer the said Messrs. Kelson, Tritton & Co. in the plea in the said plaint specified; and that the said serjeant-at-mace and minister of the said Court should then return and certify to such

Court what he should do by virtue of that precept; and the same day was given to the said Messrs. Kelson, Tritton & Co.: That afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, they the now defendants, being then found within the said city, and within the jurisdiction of the said Court, were then and there duly warned, according to the said custom, by the said serjeant-at-mace and minister of the said Court, not to part with the said sum of 2183*l.* 17*s.* 9*d.* without the license of the said Court, but the same in their hands and custody safely to keep so that the said Frederick Matthey might be attached thereby that he might appear at the said then next Court to answer the said Messrs. Kelson, Tritton & Co. in the said plea in the said plaint specified; and thereby the said serjeant-at-mace duly attached the said Frederick Matthey by the said sum of 2183*l.* 17*s.* 9*d.*; and that afterwards, to wit, at the said then next Court holden before the said mayor and aldermen of the said city, in the said chamber of the Guildhall of the said city, on the said 4th of March in the year last aforesaid, the said Messrs. Kelson, Tritton & Co., by their said attorney, appeared, and the said serjeant-at-mace returned and certified
*664] to the same Court that he by virtue of the said precept *had thereupon, to wit, on the 3d of March in the year last aforesaid, between the hours of 12 and 1 of the clock in the afternoon, attached the said Frederick Matthey by the said 2183*l.* 17*s.* 9*d.*, so being in the hands and custody of the now defendants, and the same had defended and kept in their hands and custody according to such custom, so that the said Frederick Matthey might appear at the said Court so holden on the said 4th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton & Co. in the said plea in their said plaint specified; and thereupon the said Frederick Matthey, at the same Court, was solemnly called, but did not appear, but then made a first default, which said first default at the same Court was recorded according to such custom; and thereupon, according to such custom, a further day was then given by the same Court to the said Frederick Matthey to appear at the then next such Court to be holden before the mayor and aldermen of the said city, in the chamber of the Guildhall of the said city, on the 5th day of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton & Co. in the plea in their said plaint specified; and the same day was by the said Court given to the said Messrs. Kelson, Tritton & Co., according to such custom; at which said next such Court, holden on the day and year last mentioned, the said Messrs. Kelson, Tritton & Co., by their attorney, appeared and offered themselves against the said Frederick Matthey in the plea in the said plaint specified, according to such custom; and thereupon at the same Court the said Frederick Matthey was again solemnly called, but did not appear, and then made a second default, which was recorded at the same Court, according to such custom: and thereupon, according to such custom, a further day was then given by the said Court to the said Frederick Matthey to appear at
*665] *the then next such Court, to be holden before the mayor and aldermen of the said city on the 6th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton & Co. in the plea in their said plaint specified; and the same day was by the same Court

given to the said Messrs. Kelson, Tritton & Co., according to such custom; at which said next such Court, holden on the day and year last aforesaid, the said Messrs. Kelson, Tritton & Co., by their said attorney, appeared and offered themselves against the said Frederick Matthey in the plea in their said plaint specified, according to such custom; and thereupon, at the same Court, the said Frederick Matthey was again solemnly called, and did not appear, but then made a third default, which was recorded at the same Court, according to such custom; and thereupon, according to such custom, a further day was then given by the same Court to the said Frederick Matthey to appear at the then next such Court, before the mayor and aldermen of the said city of London, to be holden in the chamber of the Guildhall of the said city on the 7th of March in the year last aforesaid, to answer the said Messrs. Kelson, Tritton & Co., in the plea in their said plaint specified; and the same day was by the same Court given to the said Messrs. Kelson, Tritton & Co., according to such custom; at which said next such Court holden on the day and year last mentioned, the said Messrs. Kelson, Tritton & Co., by their attorney, appeared and offered themselves against the said Frederick Matthey in the plea in their said plaint specified, according to such custom; and thereupon, at the same Court, the said Frederick Matthey was again solemnly called, and did not appear, but then made a fourth default, which was recorded in the same Court, according to such custom: And thereupon, afterwards, and after the said four defaults had been recorded as *aforesaid by the same Court against the said Frederick Matthey in the plea aforesaid, according to such custom, the said [*666 Messrs. Kelson, Tritton & Co., by their attorney, then at the same Court prayed process according to such custom, to warn the now defendants, the garnishees, to be and appear in the same Court to be holden on Tuesday the 24th of November in the year last aforesaid, to show cause why the said Messrs. Kelson, Tritton & Co. should not have execution of the said 2183*l.* 17*s.* 9*d.* so attached in their said hands and custody: whereupon, at such said Court so holden as aforesaid, at the said petition of the said Messrs. Kelson, Tritton & Co. made in such Court, it was commanded by the same Court to the said serjeant-at-mace that he, according to such custom, should warn and make known to the now defendants, being the garnishees, to be and appear in such Court to be so as aforesaid holden on the said 24th of November in the year last aforesaid, to show cause why the said Messrs. Kelson, Tritton & Co. should not have execution of the said 2183*l.* 17*s.* 9*d.* so attached in their hands and custody, and that the said serjeant-at-mace should then return and certify to the same Court what he should do by virtue of such precept; and the same day was given by the same Court to the said Messrs. Kelson, Tritton & Co. to be there, according to such custom: That afterwards, to wit, on the day and year last aforesaid, they the now defendants were in the said city duly warned by the said serjeant-at-mace to be and appear at such Court to be so as aforesaid holden on the said 24th day of November then instant to show cause why the said Messrs. Kelson, Tritton & Co. should not have execution of the said 2183*l.* 17*s.* 9d.; at which said Court holden on the said 24th day of November last aforesaid, the said Messrs. Kelson, Tritton & Co., by their said attorney, appeared,

*667] and the *said serjeant-at-mace then returned and certified to the same Court that he by virtue of such precept to him directed, and according to such custom, had warned and made known to the now defendants, the garnishees, to be and appear at the same Court to show such cause; and thereupon, at the same Court, the now defendants, the garnishees in such attachment, were solemnly called according to such custom, and did not appear, but made default; and thereupon, according to such custom, it was considered by the same Court that the said Messrs. Kelson, Tritton & Co. should have execution of the said 2183*l.* 17*s.* 9*d.* in moneys numbered so attached, and that they should retain and hold the same in full satisfaction of the like sum of 2183*l.* 17*s.* 9*d.*, being the amount of the debt in the said plaint mentioned, by sufficient pledges to be found and given by the said Messrs. Kelson, Tritton & Co. in the same Court, according to such custom, to restore to the said Frederick Matthey the said 2183*l.* 17*s.* 9*d.* so attached, if the said Frederick Matthey within a year and a day thence next ensuing should come into the said Court and disprove and avoid the same debt in the said plaint mentioned; whereupon the said Messrs. Kelson, Tritton & Co. afterwards, to wit, on the day and year last aforesaid, at the same Court, according to such custom, found sufficient pledges, to wit, F. H. Janson and Alfred Wilson, to restore to the said Frederick Matthey the said 2183*l.* 17*s.* 9*d.* so attached, if the said Frederick Matthey, within a year and a day thence next ensuing, should come into the same Court, holden as aforesaid, and disprove or avoid the debt in the said plaint mentioned, according to such custom: and thereupon the said Messrs. Kelson, Tritton & Co. afterwards, to wit, on the day and year last aforesaid, for the purpose of obtaining execution of the *668] said sum of 2183*l.* 17*s.* 9*d.* *so attached as aforesaid, sued out of the same Court, according to the custom of the said Court, a certain precept directed by the said Court to the said C. Fitch, being one of the serjeants-at-mace of the said Court; whereupon he was commanded by the said Court that he should take the now defendants if they were to be found within the liberties of London, and them should safely keep so that he might have their bodies there in Court without delay, to satisfy the said Messrs. Kelson, Tritton & Co. 2183*l.* 17*s.* 9*d.* attached in their hands at the suit of the said Messrs. Kelson, Tritton & Co., as the proper moneys of the said Frederick Matthey, by due process of attachment and judgment of the Court there recovered against them the said defendants, according to the tenor and effect of the said judgment thereof given; and which said precept was afterwards, and within the jurisdiction of the said Court, to wit, on the day and year aforesaid, delivered to the said serjeant-at-mace, to be executed in due form of law: And thereupon the now defendants, afterwards, and after the commencement of this action, and whilst the said precept was in the hands of the said serjeant-at-mace for the purpose of being executed, to wit, on the day and year last aforesaid, being then within the city of London and the jurisdiction of the said Court, were then and there forced and obliged, and then and there necessarily did for the purpose of satisfying the said judgment, pay to the said Messrs. Kelson, Tritton & Co. the said sum of 2183*l.* 17*s.* 9*d.*, according to the exigency of the said precept, and thereby the said Messrs. Kelson, Tritton & Co. then and there, according to the custom

of the said Court, had execution of the said debt of 2183*l.* 17*s.* 9*d.* against the now defendants, the said garnishees, according to the tenor of such judgment in that behalf given; and thereby the said execution was then executed, as by the record *and proceedings thereof [*669 remaining in the chamber of the Guildhall of the city of London aforesaid, more fully appears: That the said 2183*l.* 17*s.* 9*d.* so attached, and of which the said Messrs. Kelson, Tritton & Co. had execution by virtue of such judgment, accrued due from the now defendants to the said Frederick Matthey, and the said Frederick Matthey's cause of action in respect thereof, and the cause of action of the now plaintiff as administratrix of the said Frederick Matthey in respect thereof, arose within the city of London and the jurisdiction of the said Court, and not elsewhere; and that the said 2183*l.* 17*s.* 9*d.* were so attached before and paid after the commencement of this suit; and that the said execution was duly executed in the said city according to the custom of the said city; and that the said judgment and execution are still in force, and not in the least by the plaintiff otherwise disproved or avoided; and that the said sum of 2183*l.* 17*s.* 9*d.* claimed by the plaintiff as such administratrix of the said Frederick Matthey deceased in this action is the very same and identical sum of 2183*l.* 17*s.* 9*d.* so attached and taken in execution by the said Messrs. Kelson, Tritton & Co. by virtue of the judgment aforesaid: wherefore the defendants prayed judgment if the now plaintiff, as such administratrix as aforesaid, ought further to maintain her said action against them.

To this plea the plaintiff replied, that, before the time of the affirming of the said plaint, the said Frederick Matthey died, and he was then dead.

The defendants rejoined, that the defendant Frederick Matthey at the time of his death was indebted to Messrs. Kelson, Tritton, & Co. in 2183*l.* 17*s.* 9*d.* for money lent by the said Messrs. Kelson, Tritton & Co. for the use of the said Frederick Matthey in his lifetime and at his request, and for money found to be *due from the said [*670 Frederick Matthey in his lifetime upon accounts stated between the said Messrs. Kelson, Tritton & Co. and the said Frederick Matthey; and that, at the time of the affirming of the said plaint in the said Mayor's Court as in the third plea mentioned, neither the plaintiff nor any other person had administered to the estate and effects of the said Frederick Matthey deceased; and that the said Messrs. Kelson Tritton, & Co. were entitled to recover against the estate of the said Frederick Matthey deceased the said sum of 2183*l.* 17*s.* 9*d.*, and that they the said Messrs. Kelson, Tritton & Co. affirmed the said plaint in the said Mayor's Court as in the third plea mentioned, according to the custom of the said city of London, and, before execution was had of the said sum as in the third plea mentioned, the plaintiff took out letters of administration to the estate and effects of the said Frederick Matthey deceased, and had notice of the premises; and thereupon the plaintiff, as such administratrix as aforesaid, afterwards, and before execution was had of the said sum as aforesaid, might, according to the practice of the said Mayor's Court, and the custom of the said city of London, have caused an appearance to be entered to the said plaint of the said Messrs. Kelson, Tritton & Co., and might have defended the same, or

she might, according to the practice of the said Mayor's Court and the custom of the said city of London, have dissolved the said attachment as in the third plea mentioned, and defended the said plaint so affirmed by the said Messrs. Kelson, Tritton & Co. against the said Frederick Matthey deceased; and that all proceedings were had in the matter of the said plaint and the said attachment as in the third plea mentioned, according to the practice of the said Mayor's Court, and the custom of the said city of London, and in pursuance thereof.

*671] *The plaintiff demurred to this rejoinder, the ground of demurrer stated in the margin being, "that the plea does not show that the proceedings in the Mayor's Court have been in accordance with the custom alleged in the plea, and that the custom does not show any right of affirming a plaint against a dead man." Joinder.

Hannen, in support of the demurrer.(a)—The third plea sets out the proceedings in the Mayor's Court, and alleges that after the commencement of this action Messrs. Kelson, Tritton & Co., the plaintiffs in that suit, had execution of the debt against the now defendants, as garnishees, and that they paid the debt now sought to be recovered. The plaintiff replies, that, at the time of affirming the plaint in the Mayor's Court, Frederick Matthey, the person against whom those proceedings were instituted, was dead. The rejoinder in substance alleges, that, at the time of affirming the plaint in the Mayor's Court, no administration had been taken out to the estate of Frederick Matthey, but that, before execution had and executed in the Mayor's Court, the plaintiff administered, and that she might then, according to the practice of that Court, have appeared and dissolved the attachment. The question, therefore, to be determined upon this demurrer, is, whether by the custom of the city of London proceedings by way of foreign attachment

*672] can be had against a man who has ceased to exist, and, if so, *whether such a custom can be sustained. In Pulling's Laws and Customs of London, p. 189, the practice is thus, and it is believed correctly, stated:—"The custom of foreign attachment in London was certified into Court in an old case(b) to be, 'that, if a plaint be affirmed in London before, &c., against any person, and it be returned nihil, if the plaintiff will surmise that another person within the city is a debtor to the defendant in any sum, he shall have garnishment against him, to warn him to come in and answer whether he be indebted in the manner alleged by the other: and, if he comes, and does not deny the debt, it shall be attached in his hands; and, after four defaults recorded on the part of the defendant, such person shall find new surety to the plaintiff for the said debt; and judgment shall be that the plaintiff shall have judgment against him, and that he shall be quit against the other after execution sued out by the plaintiff.' As the original object of this process was, *to compel the defendant's appearance* and to give bail to the action, the attachment is at an end immediately

(a) The points marked for argument on the part of the plaintiff were as follows:—
"1. That the custom alleged is not a custom to affirm plaint against a dead person:
"2. That, if the custom be so alleged, it is a bad one:
"3. that the rejoinder is a departure from the plea, and does not warrant a plaint against Frederick Matthey after his death."

(b) Per Sterkey, Recorder, 22 E. 4, fo. 30 b. pl. 11; Roll. Abr. 554: and also in Roberthon v. Norroy, King-at-arms, Dyer 83 a: and see Coke's Entries 139.

that is done. In practice, however, the real defendant is not actually served with any process or notice at all, but, as a necessary foundation for the attachment, the plaintiff makes an affidavit of the debt; the names of the parties with a memorandum of the attachment are then entered in a book, called the action-book, preserved in the office of the Court, and an attachment-paper is prepared by the plaintiff's attorney, and notice thereof served upon the person in possession of the property, who is thenceforward called the garnishee or person warned. The notice is, that all the goods, moneys, and effects of the defendant then in the *garnishee's possession, or which may thereafter come to his possession, or the debt or debts due from him to [*673 the defendant, are attached to answer the plaintiff's demand; and that he (the garnishee) is not to part with such goods, or pay over such debts, without the license of the Court. No precept or process is ever issued against the defendant, nor any actual default made, nor are there any returns of nihil or defaults or otherwise actually made to any process, although there are entries thereof on the record, and the omission of such entries would be fatal. The serjeant-at-mace serves the attachment on the garnishee, and makes an entry thereof in the action-book; and thenceforward the proceedings are against the garnishee, who either appears and disputes the attachment(*a*) or suffers the property to be taken by default." But there is no pretence for saying that this ceremony, sufficiently absurd in the case of a living person, may be gone through where the person who is supposed to be summoned and to have notice is *dead*. It would be an outrage against the first principles of justice. The party must either be summoned or have notice, otherwise the proceedings will be invalid: Andrews *v.* Clerke, Carth. 25, Comb. 109, 1 Show. 11; Fisher *v.* Lane, 3 Wils. 297. In the last-mentioned case, the Chief Justice observes,—"Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good: so this custom, *not to summon* or give *notice* to a defendant in a suit commenced against him, *is contrary to the first principles of justice*, and (in my *opinion, as at present advised) cannot be good." And, in giving judgment, the Court say: "The now plaintiff, [*674 Mrs. Fisher, residing in the city of London, is sued in London by process whereof she has *no notice*, and does not appear, whereupon the officer attaches the money of John Fisher, the intestate, in the hands of the now defendants, Lane and others, that is to say, attaches Mrs. Fisher by the debt owing to her by a third person, *i. e.* the officer distrains her to appear. If she appears there is an end of the foreign attachment: it is like the process in the Courts at Westminster, by way of distraining issues to compel an appearance. It is not necessary to repeat particularly the evidence of this judgment in the foreign attachment, which consisted only of minutes taken from a book kept for that purpose; and those minutes, which an officer read from a paper in his hand, were the only evidence of the judgment: and, if this be all, the judgment is erroneous; it is said to be for the default of Mrs. Fisher's appearance: *she made no default*, for it appears *she*

(*a*) That is by disputing his own liability to the attachment, as, by a denial of any debt owing from himself, or of the defendant's title to the property attached, or by setting up a lien: Giles *v.* Nathan, 5 Taunt. 558, Nathan *v.* Giles, 1 Marsh. 226.

never was summoned or had notice, which is contrary to the principles of justice." How could these proceedings compel the appearance of a dead man?

H. James (with whom *Gates*), contrà.(a)—There being a debt due to Matthey from a person being within the jurisdiction, the proceedings in the Mayor's Court were fully warranted by the custom, which is so well known and so firmly established that it would be *idle to cite authorities in support of it. The plaintiffs in the Mayor's Court, having no notice that Matthey was dead, proceed in the usual course, and get judgment and execution against the garnishees, who, having no means of contesting the propriety of the proceedings, are compelled to pay the amount. A judgment of a Court of record,—which this is, though an inferior one,—is clearly a good protection to the defendants under such circumstances. It is admitted upon the record that the now plaintiff had notice of the attachment and of all the proceedings: and she might have come in and dissolved the attachment by giving bail. The defendants, on the other hand, had no notice of the death, and no means of defeating the attachment. There are numerous authorities to show, that, where money has been paid under a judgment of the Mayor's Court, valid upon the face of it, such payment is a discharge of the debt, even though it should turn out that the Mayor's Court had no jurisdiction to try the matter: see Harrington *v.* Macmorris, 5 Taunt. 228 (E. C. L. R. vol. 1), 1 Marsh. 33 (E. C. L. R. vol. 4); Banks *v.* Self, 5 Taunt. 234, n. Almost all the cases on the subject are collected in Westoby *v.* Day, 2 Ellis & B. 605 (E. C. L. R. vol. 75). There, in an action of debt by Westoby against Day, the latter pleaded that the debt had been attached in his hands, as garnishee, in a plaint of debt in the Mayor's Court by one Caldwell against Westoby. The plaintiff replied that the alleged debt sued for in the Mayor's Court did not arise or accrue within the jurisdiction of that Court, nor had that Court had at any time jurisdiction thereof; and the replication was held bad, on demurrer. Lord Campbell, in delivering the judgment of the Court, there says: "This replication allows that the plea replied to is good within the custom of foreign attachment in the city of London, and raises the question whether the garnishee, after a regular judgment and *execution against him, having paid the debt, may be compelled to pay it a second time on proof in this suit that the debt did not arise within the jurisdiction of the Mayor's Court. The affirmative would often work great hardship and injustice to the garnishee, who may be entirely ignorant of the origin of the debt sued for, who has no means of contesting the debt except by appearing and putting in bail to the original action, and who may be wholly unable to prove that the debt arose out of the jurisdiction of the Mayor's Court, although the fact be so. The plaintiff below, to render his proceedings effectual against the garnishee, is not even bound to prove the existence of the debt alleged to be due to him from the defendant below, nor to allege that it arose within

*675]

*676]

(a) The points marked for argument on the part of the defendants were as follows:—

"1. That the rejoinder shows that the proceedings in the Mayor's Court were in accordance with the custom of the city of London, and that such custom is reasonable and good:

"2. That the plaintiff's replication to the defendants' third plea is bad, on the ground that it raises an immaterial issue."

the jurisdiction of the inferior Court. In the recent case of De Haber *v.* The Queen of Portugal, 17 Q. B. 171 (E. C. L. R. vol. 79), we expressed an opinion that 'the process of foreign attachment can only be duly resorted to when the cause of action arose within the jurisdiction of the Court from which it issues.' But we said: 'The garnishee is safe by paying under the judgment of the Court:' adding,—'The objection that the cause of action did not arise within the jurisdiction of the Court, *if properly taken*, must prevail.' But, in the absence of fraud, the objection, as against the garnishee, comes too late after he has paid the debt to the plaintiff below under a regular judgment." All the reasoning there applies to the present case. [MONTAGUE SMITH, J.—Might you not have moved for a prohibition?] We had no means of knowing whether or not Matthey was really dead. We were bound to give credit to the proceedings of a competent Court.

Hannen, in reply.—In Westoby *v.* Day, the proceedings were valid on the face of them, and were commenced and carried on against a real person. [ERLE, C. J.—*Might not the garnishees have pleaded that they did not owe the money,* because the man was dead? [*677 *James* stated that the only plea admissible is nil habet.] The reason why the garnishee is not entitled to intervene is given in 2 Bell's Commentaries on the Law of Scotland (where the proceeding is well known), edit. 1826, p. 66: "It is the business of the original creditor alone to object to the claim of the arrestee; and, if he do not appear and object, the arrestee has no right or interest to take up the plea."

Cur. adv. vult.

MONTAGUE SMITH, J., delivered the judgment of the Court:—

In the case of an action brought by the administratrix of Frederick Matthey, the defendants pleaded to the further maintenance of the action, that the debt sued for had been attached in the Lord Mayor's Court in a suit instituted by Kelson and others against the intestate. The plea sets out the proceedings in the Lord Mayor's Court, and alleges, that, after the commencement of this action, Kelson & Co. had execution of the debt against the defendants, and that they, as garnishees, paid it. To this plea the plaintiff replied, that, at the time of affirming the plaint in the Mayor's Court, Frederick Matthey was dead. The defendants by their rejoinder in substance allege, that, when the plaint was brought in the Mayor's Court, no one had administered to the estate of Matthey, but that, before execution had, the plaintiff administered, and might by the custom have appeared in the Mayor's Court and dissolved the attachment. To this rejoinder the plaintiff demurred; and we think that she is entitled to judgment upon this demurrer.

It is admitted on the pleadings that all the proceedings in the Lord Mayor's Court took place after the *death of the nominal defendant in that suit. It could not be contended with any show of [*678 reason that the custom alleged in the plea justified the prosecution of a suit against a dead man, as if he were living; or that a custom to that effect, if alleged, would be good. Although it has been held that actual notice of the suit in the Mayor's Court need not be given to the defendant, certain proceedings must be taken, which, by intendment, are considered equivalent to notice, and which are essential to the validity of the attachment. These proceedings, the purpose of which

is to compel the appearance of the defendant, are all averred in the plea to have been duly had and taken. But it appears to us they were all null and vain, when there was no defendant to be affected by them.

The principal contention of the defendants was, that the judgment of the Mayor's Court was conclusive, and that, the garnishees having paid the debt under the attachment, the judgment quoad them could not be impeached.

We think this contention is not well founded. No doubt, the Lord Mayor's Court is a Court of record: but it is an inferior Court, and its jurisdiction may be questioned. The case of Westoby *v.* Day, 2 E. & B. 605, decided, that, in an action against garnishees to recover a debt paid by them under process of foreign attachment in the Lord Mayor's Court, it could not be averred by the plaintiff (the defendant in the Mayor's Court) that the debt did not arise within the jurisdiction of that Court.

But in that case the plaintiff Westoby (the defendant in the Mayor's Court) might have appeared and raised the objection in the Mayor's Court by a plea to the jurisdiction; and not having done so, it was held that *he*, when suing in the superior Court the garnishees who had paid the debt under the attachment, could not as against them impeach the judgment.

*679] *The present case seems to us to be distinguishable from Westoby *v.* Day, on the broad ground that, in this case, there was no defendant in the Mayor's Court who could appear or plead. The suit was commenced and prosecuted against a non-existing defendant; and the judgment cannot, as it seems to us, be conclusive, when there was nobody, as defendant, to conclude. The garnishees (the now defendants) might no doubt, when they had notice of the attachment, have appeared in the Mayor's Court, and if Matthey's death were then known to them, might probably have pleaded to the jurisdiction. But they took no step, and allowed the proceedings to go on to judgment and execution.

It is not necessary for us now to decide whether the present defendants, as between Kelson & Co., the plaintiffs in the Mayor's Court, and themselves, are estopped from disputing the attachment. But we are of opinion that the present plaintiff, who was no party to the suit, is not estopped, as against them, from showing the nullity of the proceedings.

It was further contended by the counsel for the plaintiff, that the debt now sued for was not attached at all, inasmuch as the debt assumed to be attached was a debt due from the defendants to Matthey, whereas, at the time of the attachment, Matthey being dead, there was no such debt.

Our decision being in the plaintiff's favour on the larger question, it is not necessary for us to say whether this objection should also prevail. It was held in Westoby *v.* Day that the plaintiff (the defendant in the Mayor's Court) was not estopped by the judgment from showing that the debt there attached was not attachable, by reason of the beneficial interest being vested in another.

*680] The rejoinder is founded on an alleged custom that *the plaintiff, after she became administratrix, might have appeared to the suit in the Lord Mayor's Court, and dissolved the attachment.

We think that such a custom is unreasonable and void, if it is to be understood to mean that the non-appearance of the administratrix is to give life to a suit which was a nullity from its inception: and, if the custom does not mean this, we do not see how the fact that the plaintiff did not intervene, can affect the position of the parties.

We think, therefore, that the defendants, who made no effort to avoid the attachment, or to prevent the execution of it, and who did not pay the debt until after this action had been brought against them by the administratrix, cannot avail themselves of that payment; and our judgment is given for the plaintiff.

Judgment for the plaintiff.

JAMES DAY, Appellant; MERCER HAMPSON SIMPSON, the younger, Respondent. *May* 3.

The following was held to be a dramatic entertainment or "stage-play," within the prohibition of the 6 & 7 Vict. c. 68:—On the rising of the curtain, there was a representation of a storm at sea and of a man swimming, not a living person, but in theatrical phrase a "double." When the storm subsided, a drop-scene was disclosed, with a lake in the back-ground. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily on the stage; and they were twice on the stage together. There were several other characters,—a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them: but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music and singing, but no change of scenery or dress during the performance.

THE following case was stated by the stipendiary magistrate for the borough of Birmingham, for the opinion of this Court:—

*By statute 6 & 7 Vict. c. 68, s. 2, it is enacted that it shall [*681 not be lawful for any persons to have or keep any house or other place of public resort for the public performance of *stage-plays*, without authority by virtue of letters patent from Her Majesty, her heirs, &c., or without license from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace, as thereinafter provided (s. 5): And every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the Court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been kept open by him for the purpose aforesaid, without legal authority.

By s. 11 of the same statute, every person who for hire shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage-play in any place not being a patent theatre, or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the Court in which, or the justices by whom, he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend.

By s. 16, it is enacted, that, in every case in which any money or other reward shall be taken or charged directly or indirectly, or in which the purchase of any article is made a condition for the admission of any person into any theatre to see any stage-play; and also in every case in which any stage-play shall be acted or presented in any house, room, or place in which distilled or fermented exciseable liquor shall be sold, every actor shall be deemed to be acting for hire.

And, lastly, by s. 23 it is enacted, that, in this Act, the word "stage play" shall be taken to include any *tragedy, comedy, farce, opera, burletta,* *682] *interlude, *melo-drama, pantomime, or other entertainment of the stage,* or any part thereof.

On the 15th of December, 1864, James Day (herein called the appellant), licensed victualler, appeared before the stipendiary magistrate for the borough of Birmingham on two informations at the instance of Mercer Hampson Simpson, the younger (herein called the respondent), being the proprietor of a licensed theatre in the same borough, framed respectively upon the 2d and 11th sections of the above statute; the first charging that, on the 24th of November last, he did unlawfully keep a certain house and place of public resort in the said borough for the public performance of stage-plays, without authority in that behalf by virtue of any letters patent, or a license from Her Majesty's justices of the peace, &c., and did unlawfully continue so keeping open the same for four successive days thereafter, contrary to the Act of 6 & 7 Vict. c. 68, which hath for the said offence imposed a forfeiture of any sum not exceeding 20*l.* for each of the said days on which the said house and place was so kept open for the purpose aforesaid.

The second information charged that the said appellant did unlawfully for hire cause and permit and suffer to be acted and presented certain parts in certain stage-plays called, &c., &c., in a certain place, to wit, a house, the said place not being a patent theatre or duly licensed as a theatre, and continue the same for four successive days, contrary to the Act, &c., which hath for the offence aforesaid imposed a forfeiture of any sum not exceeding 10*l.* for each of the said days.

It was proved that the appellant is the occupier of a concert hall licensed under the 73d section of the Birmingham Improvement Act, 1861 (24 & 25 Vict. c. ccvi.), as a place kept and used for public danc- *683] ing, music, and other public entertainments of the like *kind; that he was a licensed victualler; that the concert hall consisted of a large room, the floor being covered with seats and small tables for refreshment, consisting, among other things, of distilled and fermented exciseable liquors; that there was a gallery round three sides of the hall, fitted up with similar seats and tables; that the fourth side or further end of the hall presented the appearance of a regular theatre, with a stage raised above the floor of the hall, a proscenium, a curtain, a float for foot-lights, wings, and drop-scene; and that every person entering the hall paid 6*d.*, in exchange for which he received a check entitling him to refreshments of the value of 3*d.* and a seat in any part of the hall during the whole evening.

It was proved also, that, when the public were admitted, the curtain of the stage was down, but that it was subsequently raised, and the following performance then took place on and about the stage:—

On the rising of the curtain, there was a representation of a storm at sea and of a man swimming. This was not a living person, but, in theatrical phraseology, a "double" of the prince hereafter named. When the storm subsided, a drop-scene was disclosed, with a clear lake in the back-ground.

A character then appeared upon the stage in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant; and a conversation was held between them. The latter was described by the witnesses as a "low comedian." These two were the only persons who during the course of the evening appeared bodily on the stage. They were twice on the stage together; and the dialogue between them on each occasion was short and comparatively unimportant.

*There were several other characters,—a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. The peculiarity of the representation, and that which, according to the contention of the appellant, distinguished it from an ordinary "stage-play" or "entertainment of the stage," was the following:— [*684

With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage. They had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them; but, by a complication or combination of lenses and mirrors, their figures were reflected upon a mirror at the back of the stage so ingeniously and effectually that to the spectators the appearance was that of persons actually upon the stage. There was a good deal of dancing and music and singing; and there was no change of dress or scenery during the performance.

It was admitted that the place was not a patent theatre, and that the appellant had no license from the Lord Chamberlain or the justices, except as above mentioned.

It was contended on his behalf that he was not liable to be convicted of an offence under the above mentioned section of the 6 & 7 Vict. c. 68, because,—first, he was licensed under s. 73 of the Birmingham Improvement Act, 1861, to keep a room or place for public dancing, music, and other public entertainments of the like kind; that the performance above set forth came under the description of a public entertainment of the like kind with those specified; and that the latter statute, being of a later date than the 6 & 7 *Vict., must be taken pro tanto to operate as an exclusion of the borough of Birmingham from the provisions of that statute. [*685

The magistrate was of opinion that the entertainment was essentially different from those to which the appellant's license extended, and that the defence on that ground was without weight.

It was then contended, secondly, that it was not an "entertainment of the stage," inasmuch as only one of the characters who sustained the plot of the piece was bodily upon the stage, the second being an unimportant subordinate; and that the others were merely represented upon a mirror at the back of the stage, by optical illusion.

The magistrate was of opinion, that, in order to constitute an "entertainment of the stage" (it having been proved there was a regular plot and dialogue), it was not at all essential that all the characters should be bodily upon the stage; and he considered the offence proved, and convicted the appellant in a nominal penalty upon each information.

The question for the opinion of the Court was, whether the determination of the magistrate was right or not.

Hayes, Serjt., for the appellant.—The question turns upon the construction of the 6 & 7 Vict. c. 68, the 2d section of which prohibits the keeping of any house or other place of public resort for the public performance of stage-plays without letters patent or license. The interpretation clause, s. 23, enacts that the word "stage-play" shall be taken to include every tragedy, comedy, farce, burletta, interlude, melodrama, pantomime, or other entertainment of the stage, or any part thereof." These are substantially the words contained in the 7th section of the 10 G. 2, c. 28. That statute came under *the consideration of the Court of Queen's Bench in two cases. The first was Gallini *v.* Laborie, 5 T. R. 242, where it was held that no action could be maintained for the breach of an agreement "to dance at the King's Theatre in the Haymarket, or at such other place as the plaintiff should appoint," it appearing that no license for that theatre was granted by the Lord Chamberlain, as required by the 10 G. 2, c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. It was there contended that the statute did not extend to dancing. But Lord Kenyon said,—"I think the statute of 10 G. 2 does extend to this and every other species of stage entertainment. The words are general; and the intent of the legislature manifestly was, to put all places of public diversion under the control of the magistracy. The subsequent statute of the 25 G. 2, c. 36, puts all sorts of places opened for public diversion under the direction and appointment of the magistrates at large, and is applicable to other entertainments than those of the stage. Under the former Act, no *entertainment of the stage*, of which dancing is one, can be exhibited without the Lord Chamberlain's license; and, none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement which, without such license, it was unlawful for him to execute." His lordship, however, in the next case, of The King *v.* Handy, 6 T. R. 286, recalls that opinion. It was there held that *tumbling* is not an entertainment of the stage within the meaning of the 10 G. 2, c. 28. Lord Kenyon says: "The decision in the case alluded to, of Gallini *v.* Laborie, was perfectly right, because that case clearly came within the statute 25 G. 2, c. 36. But, if I expressed myself, as has been now represented, that the statute 10 G. 2, c. 28, extended to every species of *stage entertainment, I think I was mistaken. In that case it was not necessary to consider that Act so particularly as it is in the present case; and, our immediate attention being now called to it, I do not think that tumbling is an entertainment of the stage within the meaning of that Act of Parliament: it might equally be said that fencing on a public stage is. This is a penal Act of Parliament, and we cannot extend it to entertainments that did no exist when the statute was made." This place was licensed

*686]

*687]

under the 73d section of the Birmingham Improvement Act, 1861, 24 & 25 Vict. c. ccvi.,—which is almost in terms a re-enactment of the 25 G. 2, c. 36, s. 2,—for "public dancing, music, and other public entertainments of a like kind." Does the entertainment here exhibited come within the prohibition of the 6 & 7 Vict. c. 68? It is not a tragedy, comedy, farce, burletta, interlude, melodrama, or pantomime. It is an entertainment altogether of a novel kind, and could not have been within the contemplation of the legislature at the time of the passing of the Act,—an Act which, as Lord Kenyon observes, is of a highly penal character. Ghosts have not unfrequently been introduced into dramatic entertainments,—in Hamlet and Julius Cæsar, for instance. But there they were, so to say, only subordinate personages. This is the first time that shadows have been made the substance of the entertainment. It is a mere exhibition of an optical illusion. [MONTAGUE SMITH, J.—You have a set drama here.] Would the popular entertainment of "Punch" be within the prohibition, if exhibited on a stage, with side scenes and foot-lights? What difference can there be in this respect between puppets and shadows? Would a lecture delivered on a stage with scenery and foot-lights be a dramatic entertainment? [BYLES, J.—Are poses plastiques within the statute?] Clearly not: the object there is, merely to exhibit a picture.

Field, Q. C., for the respondent.—It is submitted that the entertainment in question falls clearly within the prohibition [*688 of the statute, and that the magistrate was right in convicting the appellant. The earliest enactment to be found upon the subject of stage-plays is contained in the 3 Jac. 1, c. 21, which "for the preventing and avoiding of the great abuse of the Holy name of God in stage-plays, interludes, May-games, shows, and such like," enacts, that, "if at any time or times after the end of that session of Parliament, any person or persons do or shall in any stage-play, enterlude, show, May-game, or pageant, jestingly or profanely speak or use the Holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity, which are not to be spoken but with fear and reverence, [he] shall forfeit for every such offence by him committed 10*l.*" Then came the 12 Ann. stat. 2, c. 23, which enacted "that all fencers, bearwards, common players of interludes, &c., shall be deemed rogues and vagabonds." Then followed the 10 G. 2, c. 28, the 1st section of which, reciting the statute of Anne, enacted that "every person who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part or parts thereof, in case such person shall not have any legal settlement in the place where the same shall be acted, represented, or performed, without authority by letters patent from His Majesty, his heirs, successors, or predecessors, or without license from the Lord Chamberlain of his Majesty's household for the time being, shall be deemed to be a rogue and a vagabond within the intent and meaning of the said recited Act, and shall be liable and subject to all such penalties and punishments, and by such methods of conviction, as are inflicted on or appointed by the said Act *for the punishment of rogues and vagabonds [*689 who shall be found wandering, begging, and misordering themselves, within the meaning of the said recited Act." And the 2d section imposed a penalty of 50*l.* on any person who having or not hav-

ing a legal settlement as aforesaid, should without such license as aforesaid, act, represent, or perform, or cause to be acted, represented, or performed, for hire, gain, or reward, "any interlude, tragedy, comedy, opera, play, farce, or *other entertainment of the stage*, or any part or parts thereof." It was under that statute that the question in Gallini *v.* Laborie, 5 T. R. 242, arose. The engagement there was, to dance in "ballets," which have every incident of a stage-play except language. There is no ground for quarrelling with the judgment in that case: and the subsequent case of The King *v.* Handy, 6 T. R. 286, does not interfere with it. The Dramatic Copyright Act, 3 & 4 W. 4, c. 15, secures the sole liberty of representation to the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment." Under that statute, an introduction to a pantomime, —that is, the only *written* part of the entertainment,—was held in Lee *v.* Simpson, 3 C. B. 871 (E. C. L. R. vol. 54), to be within the statutory protection. The doctrine was carried a little further in Russell *v.* Smith, 12 Q. B. 217 (E. C. L. R. vol. 64), where it was held that a song which related to the burning of a ship at sea, and the escape of those on board, described their feelings in vehement language, and sometimes expressed them in the supposed words of the suffering parties, was "dramatic," and therefore within the meaning of the statute, though sung only by one person, sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress. "The absence," said Lord Denman, "of scenes and appropriate dresses and a regular theatre has been urged for the *690] defendant. *But we should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments."(a) It is impossible to say whether this was a tragedy, a comedy, or a farce; the dialogue not being set out in the case. But there is a stage, a curtain, proscenium, foot-lights, and all the accessories of a stage-play. Two performers at least appeared upon the stage; and it can make no difference in the legal character of the performance that *all* the performers were not there bodily. Suppose the reflections, or shadows, as they are called, were not seen upon the stage at all, the entertainment would not be the less within the prohibition of the statute. That this sort of spectacle was unknown at the time of the passing of the 6 & 7 Vict. c. 68, clearly makes no difference: that was settled by Gambart *v.* Ball, 14 C. B. N. S. 306 (E. C. L. R. vol. 108). In the case of Pepper's Ghost, there was no dialogue,—nothing to make the exhibition at all analogous to a dramatic entertainment or stage-play. Even Marionettes may become stage plays, if accompanied by a regular dialogue carried on by unseen living actors.

Hayes, Serjt., in reply.—The Dramatic Copyright Act has nothing whatever to do with this question. The entertainment in the case of Russell *v.* Smith, 12 Q. B. 217 (E. C. L. R. vol. 64), was a musical entertainment dramatized, and might well be held to be within the meaning of the Act. The thing complained of in Gambart *v.* Ball, 14 C. B. N. S. 306 (E. C. L. R. vol. 108), the multiplication of copies of a picture by photography, was the very thing the statutes for the protection of artists and engravers was levelled at, though the mechan-

(a) And see Russell *v.* Briant, 8 C. B. 836 (E. C. L. R. vol. 65).

ical means were new. This statute clearly would not apply to dramatic *readings. A dramatic performance or entertainment necessarily involves the appearing and acting of living persons on the stage. It cannot be too much urged that this is a highly penal statute, and that the question is one of grave importance. [*691

ERLE, C. J.—I come to the conclusion that the conviction in this case should be confirmed. I am very desirous of not laying down anything calculated to prevent the exhibition of ingeniously contrived spectacles for the amusement of the public. But the law requires that every person who keeps a house or other place of public resort for the exhibition of stage-plays or other entertainments of the stage, shall be licensed in the manner pointed out by the 6 & 7 Vict. c. 68, s. 2. I think the entertainment described in this case is within that statute: and, if the appellant wishes to continue this exhibition, which seems to have been conducted with all the accessories of the stage,—a curtain, footlights, a drop-scene and wings, living actors on the stage at the commencement, dialogue, dancing, music, and singing, all seen and heard by the audience,—he must arm himself with the authority which the law has provided for that purpose. Upon the description given of this entertainment, I am unable to discover that the magistrate has arrived at an erroneous conclusion.

BYLES, J.—I am of the same opinion. Nothing can be larger than the words of the 6 & 7 Vict. c. 68. The 2d section prohibits the keeping any house or other place of public resort for the public performance of "stage-plays," without authority by virtue of letters patent from Her Majesty, &c., or without license from the Lord Chamberlain for the time being, or from the justices of the peace. And the interpretation clause, *s. 23, defines "stage-play" to mean and include "any tragedy, comedy, farce, opera, burletta, interlude, melodrama, pantomime;" and then follow these still more comprehensive words, "or other entertainment of the stage, or any part thereof." I observe two words in this Act which were not in the former Act of 10 G. 2, c. 28, viz. "burletta" and "pantomime," which may well have been introduced still further to enlarge the meaning of "stage-play." It seems to me that there are here three distinct infringements of the statute. There was a representation of a storm at sea, with a "double" swimming, and then a character appeared upon the stage, in the costume of a Greek prince. It seems to me that these, at all events, formed part of an entertainment of the stage. Then there is the introduction of dialogue between persons not seen by the audience, with the usual theatrical accessories of music and singing and dancing. My Brother *Hayes* asked whether a public lecture delivered on the stage, with scenery and foot-lights, would be a dramatic entertainment or stage-play within the Act. I am by no means clear that it would not. I do not say that the reflection of figures on mirrors on a stage, without the accessories of actors, dialogue, scenery, lights, and music, would constitute an infringement of the statute; but I am clearly of opinion that an entertainment such as that described in this case is within the prohibition of the statute. [*692

KEATING, J.—I entirely concur in the opinion expressed by my Lord and my Brother Byles, and have nothing to add.

MONTAGUE SMITH, J.—I am of the same opinion. The entertainment

in question is thus described in the case:—On the rising of the curtain, there was a *representation of a storm at sea and of a man swimming, not a living person, but in theatrical phrase a "double." When the storm subsided, a drop-scene was disclosed, with a lake in the back-ground. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily upon the stage; and they were twice on the stage together. There were several other characters, —a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them: but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, and singing, but no change of scenery or dress during the performance. The exhibition thus described seems to me to have had all the characteristics of an entertainment of the stage. My Brother *Hayes* says that this is a highly penal statute, and that the consequences of holding this to be an entertainment of the stage will be very serious. It may be so. But all we can do, is, to construe legislation as we find it. Upon the facts found by the magistrate here, I think it is impossible for us to affirm that he came to a wrong conclusion. Conviction affirmed.

*693]

---

*694] *PHILLIPS and Another *v.* J. C. IM THURN. *May* 8.

The acceptor supra protest of a bill of exchange, for the honour of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill; and, consequently it is not competent to him to set up as a defence to an action against him by an endorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time he accepted the bill.

This was an action against the acceptor for honour of a bill of exchange. The declaration and pleas are set out antè, p. 404.

To the 6th plea,—that, when the bill of exchange in the first count mentioned was made, there was no such person as Carlos Raffo, the supposed payee named in the said bill, but the said name of Carlos Raffo was and is merely fictitious, whereof the defendant at the time of his acceptance of the said bill had no notice or knowledge,—the plaintiffs demurred; the ground of demurrer stated in the margin being, "that the defendant is by his said acceptance estopped from saying that there was no such person as Carlos Raffo, the person named in the said bill." Joinder.

Hannen, in support of the demurrer.—The acceptor for honour is liable for the engagement of the drawer, in whose place he by his intervention puts himself. It must be assumed that the drawer was

aware that the payee was a fictitious person. The effect of such a transaction, as against an ordinary acceptor, was considered in Gibson *v.* Minet, 1 H. Bl. 569. Upon the authority of that case and the note to Bennett *v.* Farnell, 1 Campb. 130, 133, it is laid down in Byles on Bills, 8th edit. 73, that, "if the acceptor, at the time of acceptance, *knew* the payee to be a fictitious person, he shall not take advantage of his own fraud; but a bonâ fide holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts." The note in Campbell is as follows,—"Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co., *and Gibson & Co., who negotiated bills with fictitious names upon them, to the amount of nearly *a million sterling a year*. The first case was Tatlock *v.* Harris, 3 T. R. 174, in which the Court of King's Bench held that the bonâ fide holder for a valuable consideration of a bill drawn payable to a fictitious person, and endorsed in that name by the drawer, might recover the amount of it in an action against the acceptor for money paid or money had and received, upon the idea there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In Vere *v.* Lewis, 3 T. R. 182, decided the same day, the Court held there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this: and three of the judges *thought* the plaintiff might recover on a count which stated that the bill was drawn payable to *bearer*. Minet *v.* Gibson, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the Court was, that, where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the Court of Common Pleas laid down the same doctrine in Collis *v.* Emett, 1 H. Bl. 313. This decision was acquiesced in; but Gibson *v.* Minet was carried up to the House of Lords (1 H. Bl. 569). The opinion of the Judges being then taken, Eyre, C. B. (p. 598), and Heath, J., (p. 619), were for reversing the judgment of the Court below, and Lord Thurlow, C., coincided with them (p. 625); but, the other Judges thinking otherwise, judgment was affirmed (2 Bro. P. C. 48). The last case upon the subject reported, is, Gibson *v.* Hunter, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held, that, in an action on a bill of this sort against the acceptor, to *show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. Vide Tuft's case, Leach Cro. Law 206." All the reasoning which is applicable to the acceptor must be applicable à fortiori to the drawer. Does the fact of the acceptance here being for the honour of the drawer make any difference? The obligation into which an acceptor for honour enters, is, that he will, on the drawee's default, pay the bill on behalf of the drawer,—his intention being solely to protect the interest and the honour of the drawer. Why, then, should he be at liberty to set up a defence which the drawer himself could not set up? The law which governs this subject is most clearly laid down in Story on Bills, §§ 123–125. "The acceptance of a bill suprà protest for non-acceptance," says that learned author, "imports an obligation on the

[*695

[*696

part of the acceptor, that, if the bill is not paid by the drawee upon due presentment at its maturity, and it is then duly protested for non-payment, and due notice thereof is given to the acceptor suprà protest, he will pay the same. Such presentment, protest, and notice, are therefore indispensable requisites to make the liability of such an acceptor absolute.(a) An acceptance suprà protest enures for the benefit of all the parties on the bill subsequent to the person for whose honour it is accepted. Thus, if the acceptance be for the honour of the drawer, it enures to the benefit of the payee and all subsequent endorsees and holders under him. If accepted for the honour of the first, second, or third endorser, it enures for the benefit of all subse-
*697] quent endorsers or holders *under them accordingly, but not for the benefit of antecedent endorsers or holders. If accepted for the honour of the bill, that is, of all the parties on the bill (as it may be), then, of course, it enures to the benefit of all the parties except the drawer. If accepted for the honour of the drawee, then it enures, or at least it may enure, for the benefit of the drawer as well as of the payee and subsequent holders, if the drawer was entitled to have the bill accepted by the drawee. On the other hand the acceptor suprà protest, upon giving proper notice thereof, and a due payment of the bill, has his own rights and recourse over against the person or persons for whose honour he accepted the same, and against all other parties to the bill who are liable to the same person or persons.(b) But he has no recourse over against any other parties to the bill. Hence, if he accepts for the honour of the drawer, he has no remedy against the payee or any subsequent endorser: nor, if he accepts for the honour of the payee, will he have any against the subsequent endorsers. If he accepts for the honour of the bill generally (that is, of all the parties thereto), he has a remedy against all of them except the holder at the time of the acceptance. It follows also
*698] from what has been said, that *an acceptance for the honour of the drawer only will, or at least may under particular circumstances, entitle the acceptor to the same remedy against the drawee which the drawer himself would have.(c) Similar principles are recognised in the foreign commercial law, as to the rights and remedies growing out of acceptances suprà protest. In the French law it is called an Intervention on the part of the stranger who accepts for the honour of any of the antecedent parties: and he thus performs the functions, and contracts the engagements, and acquires the rights, of the negotiorum gestor of the Civil law. Heineccius affirms the like doctrine,—Heinec. de Camb. C. 6, § 9, p. 54. Id. c. 2, § 10. Id. C.

(a) Citing Bayley on Bills, 5th edit. 176–179; Chitty on Bills, 8th edit., 375, 382; Hoare v. Cazenove, 16 East 391; Williams v. Germaine, 7 B. & C. 468, 1 M. & R. 394; 3 Kent, Comm., 4th edit. 87; Mutford v. Walcot, 1 Ld. Raym. 574.

(b) Citing Bayley on Bills, 5th edit. 179, 180; Chitty on Bills, 8th edit. 382, 383; Beawes Lex Merc., by Chitty, vol. 1, 569; 3 Kent's Comm. 4th edit. 87; Konig v. Bayard, 1 Peters R. 250; Mertens v. Winnington, 1 Esp. N. P. C. 113. In Mertens v. Winnington, Lord Kenyon said that an acceptor suprà protest "is to be considered as an endorsee paying a full value for the bill, and as such entitled to all the remedies to which an endorsee would be entitled, that is, to sue all the parties to the bill." This is too loosely and generally said; for, the acceptor has no remedy against the holder from whom he received it, nor against any endorsee upon the bill whose name is subsequent to that of the person for whom he accepts.

(c) Citing Ex parte Wackerbath, 5 Ves. 574, and Ex parte Lambert, 13 Ves. 179.

3, § 10. Qui in honorem trassantis litteras cambiales ad se non directas acceptavit, perinde, ac ipse trassatus tenetur. Hinc integrum est præsentanti, adversus eum, si constituto die non solverit, actione cambiali experiri. Contrà ea et hic præstita solutione, agit adversus trassantem ad recuperandam summam solutam, una cum provisione, damnis, et impensis. Quum in finem hæc acceptatio non aliter fieri solet, quam sopra protesto. The rights of the acceptor suprà protest, upon his intervention, stand upon the general maxim, Qui alterius jure utitur eodem jure uti debet. He stands subrogated to the rights of the holder." Upon general principles, and upon the reason and justice of the thing, it is submitted, it does not lie in the mouth of one who by his intervention has set the bill afloat, and has induced another person to part with money for it, to say that which the person for whom he intervenes could not have said.

Lush, Q. C. (with whom was *Sir G. Honyman*), *contrà.(a)—It may be conceded that the *drawer* would be precluded from setting up as a defence to a claim against him upon the bill, that the payee was a fictitious person. But the acceptor for honour is not so estopped. The acceptance by the drawee admits only the capacity of the drawer to draw the bill: and the acceptor for the honour of the drawer stands in no different position than the drawee would have stood in had he accepted the bill. In truth he is an acceptor without value. The only authority upon the subject seems to be that of Story on Bills, §§ 261, 262. "The obligations," he says, "resulting from a general acceptance have been already considered in another place. They are, on the part of the acceptor, to pay the bill upon presentment, at its maturity, or at any time afterwards, according to its tenor, to the holder. The obligations of an acceptor for honour, or suprà protest, are not (as has been already stated) exactly coincident with the former; for, whereas the obligations of a general acceptance are absolute, those of an acceptance for honour or suprà protest are conditional, to wit, that the acceptor will pay the bill, if duly presented to the original drawee for payment at the time of its maturity, and he refuses payment, and due protest is made thereof, and due notice is given to him of the *dishonour. All these acts must be punctually done, or the acceptor will be discharged. Pothier affirms the like doctrine as the law of France: Pothier du Change, n. 113: and Heineccius (de Camb. c. 6, § 9) states it, without any distinction between the cases where the bill is to be protested for non-acceptance and where it is protested for non-payment. There is another collateral consideration resulting from an acceptance, which ought to be mentioned in this place. It is, that the acceptance, whether general, or for honour or suprà protest, after sight of the bill, admits the genuineness of the signature of the drawer; and, consequently, in favour of

[*699

[*700

(a) The points marked for argument on the part of the defendant were as follows:—

"1. That the sixth plea is good, because, the bill being made payable to the order of a fictitious person, no such order can possibly have been made, and the supposed endorsement by such person must be a fiction and nullity, and can give no title to any person to sue upon the bill as an endorsee thereof:

"2. That the defendant, not having had any notice at the time of his acceptance that the bill was drawn payable to a fictitious person, or his order, is not estopped from pleading the matters contained in the said sixth plea as a bar to the action."

a bonâ fide holder for value, without notice, if the signature of the drawer turns out to be a forgery, the acceptance will nevertheless be binding, and entitle such holder to recover thereon according to its tenor. *But there is no such implied admission, on the part of the acceptor, of the genuineness of the signature of the payee or of any other endorser;* and, consequently, the holder, in order to recover against the acceptor upon the bill, must establish by proofs the genuineness of their signatures, in order to make title thereto, although he need not prove the genuineness of that of the drawer. In like manner, an acceptance admits the ability of the party to draw, and, if drawn by an agent in the name of his principal, it also admits that he has full authority to draw the bill. But it does not admit the authority of the agent to endorse the same bill, even though it is made payable to the order of his principal, and is endorsed by the same agent in the name of the principal." There can be no reason why an acceptance for honour should admit more than an ordinary acceptance admits.

*701] *Hannen*, in reply.—If, as Story admits, the acceptor *for honour has his remedy over against the drawer, why should not his liability be co-extensive with that of the drawer of the bill?

ERLE, C. J.—I am of opinion that our judgment in this case should be for the plaintiff. The action is brought by the holder of a bill accepted by the defendant suprà protest for the honour of the drawer, acceptance having been refused by the drawee. At the maturity of the bill all things were done which were necessary to fix the defendant with liability as an acceptor for honour: and the defence relied on, is, that the bill was drawn payable to a fictitious payee, of which fact the defendant had no notice at the time of his acceptance of the bill. I take it to be clear, that, if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer, or, in other words, that he would have been estopped from denying the endorsement of the payee. It seems to me that there is good reason for saying that that which the drawer would be estopped from denying the acceptor for honour should also be estopped from denying. I think he is equally bound to admit that the bill is a valid bill. The acceptor suprà protest paying the bill has all the rights against the drawer that an ordinary holder would have. I find no authority which contravenes this view; and it seems to me that it receives confirmation from the passages cited from Story on Bills.

BYLES, J.—I am of the same opinion. The defendant, as acceptor suprà protest, is subrogated for the drawer. He has all the rights and all the liabilities of the drawer, and is, I think, equally precluded

*702] *from denying that the bill is a valid bill payable to bearer.

KEATING, J.—I am entirely of the same opinion.

MONTAGUE SMITH, J.—I am of the same opinion. The acceptor suprà protest has his remedy against the drawer, and is as much estopped as the drawer is from saying that the bill is not a valid negotiable instrument. I do not think Story had this precise case in his mind: but still I think the present defendant substantially stands in the same predicament as did the acceptor in the case there put.

The acceptor for honour must be considered as the drawer for this purpose. Judgment for the plaintiff.

The Rev. H. J. DAY, Clerk, *v.* PEACOCK, Clerk to the Burial Board of BARNSLEY, in the county of York. *May* 3.

The Rev. C. F. COBB, Clerk, *v.* SAME.

The Rev. W. J. BINDER, Clerk, *v.* SAME.

1. The incumbent of a *district church* to which a burial-ground had been appropriated before the passing of the 15 & 16 Vict. c. 85, and which district had been carved out of a township having separate overseers, and maintaining its own poor, is by the 32d section of that Act entitled to all the fees he formerly enjoyed in respect of burials in his district, for burial services performed by him in a new burial-ground provided by the burial board of a parish or township since that Act.

2. And, where an ecclesiastical district having a burial-ground has been divided into two districts, but no burial-ground has been allotted to the second district, the incumbent of the first created district is entitled to the fees for the burial of inhabitants of both districts.

THESE actions were brought by the respective plaintiffs therein against the burial board for the township of Barnsley, in the county of York, for the recovery of *fees claimed to be payable by [*703
the defendants to the plaintiffs respectively, for burials, and the erecting or placing of monuments, grave-stones, tablets, and monumental inscriptions in the burial-ground provided by the defendants for the township of Barnsley under the provisions of the statutes relating to the burial of the dead: and by the consent of the parties, and under a Judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the Court, without pleadings:—

1. The township of Barnsley, in the county of York, forms a part of the parish of Silkstone. It has separate overseers of the poor, and separately maintains its own poor.

2. Up to the time of the making of the order in council of the 8th of August, 1831, hereinafter mentioned, the said township formed one parochial chapelry, which had existed from time immemorial. The church of St. Mary's was the parochial chapel of the said chapelry, and within the said township was an ancient burial-ground, in which from time immemorial the remains of the inhabitants of the said chapelry had been and were of right entitled to be buried; and for burials in this burial-ground, and for the erection of monuments therein and in the said church of St. Mary, fees had always been paid to the incumbent for the time being of the said chapelry.

3. In or about the year 1823, an additional church, called St. George's church, was built within the said chapelry by Her Majesty's Commissioners for building new churches, under provisions of 58 G. 3, c. 45, and 59 G. 3, c. 134; and on or about the 16th of June, 1824, a burial-ground within the said township was under the provisions of the same statutes purchased and appropriated by the said Commissioners as and for a burial-ground for the said church of St. George. *This church and burial-ground were afterwards duly conse- [*704
crated.

4. By an order in council, bearing date the 8th of August, 1831, a

district was divided from the said chapelry, and assigned to the said church of St. George, under the provisions of the statutes above referred to, and of the statute of 7 & 8 G. 4, c. 72. A copy of this order in council accompanied the case.

5. The district so assigned to the said church of St. George has since the said order in council been called St. George's district. The residue of the said township has since the same order in council been called St. Mary's district. In this latter district are situate the said church of St. Mary and the said ancient burial-ground belonging to the said chapelry. This ancient burial-ground was enlarged about forty years ago, and, from the time of its being so enlarged until the formation of St. George's district as aforesaid, was the burial-ground of the said chapelry, and since the formation of St. George's district as aforesaid has been the burial-ground of the said district of St. Mary; and for burials and the erection of monuments therein, fees have always been paid to the incumbent for the time being of St. Mary's.

6. Since the formation of St. George's district as aforesaid, the burial-ground so appropriated as and for the burial-ground of St. George's church as aforesaid, has been the burial-ground of the said district of St. George's; and for burials and the erection of monuments therein, fees have always been paid to the incumbent for the time being of St. George's district.

7. By an order in council, bearing date the 23d of May, 1844, a district called St. John's district was divided from St. George's district under the provisions of the statutes above referred to. A copy
*705] of this order in council accompanied the case. From the *making of this order until the year 1858, divine service for St. John's district was performed in a school-room in that district; and in 1858 a church called St. John's church was built in and for the same district, in which church divine service has since been performed.

8. The district so assigned to St. John's church has since the said last-mentioned order in council been called St. John's district. The residue of St. George's district has since the same order in council been called St. George's district.

9. There has never been any burial-ground assigned to or belonging to St. John's district; but the remains of persons dying within the limits of this district have been accustomed to be buried in the burial-ground of St. George's district, of which St. John's district formerly formed part: and for such burials in the said burial-ground of St. George's district, fees have always been paid since the formation of St. George's district as aforesaid, to the incumbent for the time being of St. George's district.

10. By an order in council bearing date the 2d of February, 1857, made under the provisions of 16 & 17 Vict. c. 134, it was ordered (amongst other things) that (with certain exceptions therein mentioned) burials should after periods in that behalf appointed be discontinued in the said burial-grounds of St. Mary's and St. George's districts. A copy of this order in council accompanied the case.

11. Upon the last-mentioned order in council being made, it became necessary to provide a new burial-ground for the said township of Barnsley; and, the vestry of the said township having refused to provide such burial-ground, the local board of health for the said

township became on or about the 3d of February, 1858, under the provisions of the 4th section of the *20 & 21 Vict. c. 81, the burial board for the said township. [*706

12. The said burial board afterwards, under the provisions of the various statutes relating to the burial of the dead, duly provided a burial-ground for the said township.

13. The burial-ground so provided by the said burial board (except the portion thereof not intended to be consecrated, and upon which portion a chapel is erected and built), was with a chapel erected thereon, on or about the 6th of November, 1861, duly consecrated; from which time it became the burial-ground for the said several ecclesiastical districts of the said township, within the meaning and according to the provisions of the said last-mentioned statutes.

14. The plaintiff the Rev. Henry Josiah Day is the incumbent of the said district of St. Mary, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. Mary, and also to be entitled to receive the same fees in respect of such burials which he had previously enjoyed and received for burials in the said burial-ground of St. Mary's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. Mary's district. He also claims to be entitled to fees for such monuments, gravestones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, or in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. Mary, in lieu of the fees or sums which he would have been entitled to for the erecting *or placing of such monuments, gravestones, tablets, and monumental inscriptions in [*707 the said burial-ground of St. Mary's district, or in the said church of Saint Mary.

15. The plaintiff the Rev. Clement Francis Cobb is the incumbent of the said district of St. George's, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the burial-ground so provided by the said burial board, of the remains of parishioners or inhabitants of the said district of St. George, and also to be entitled to receive the same fees in respect of such burials which he had previously enjoyed and received for burials in the said burial-ground of St. George's district, as if such burial-ground so provided by the said burial board were the burial-ground of St. George's district. He also claims to be entitled to fees for such monuments, gravestones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. George, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets, and monumental inscriptions in the said burial-ground of St. George's district, or in the said church of St. George.

16. The plaintiff the Rev. William John Binder is the incumbent of the said district of St. John, and claims to be entitled to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the burial-ground so provided by the said burial board, of the remains of parishioners or
*708] inhabitants of the said district of St. *John, and also to be entitled to receive the same fees in respect of such burial which he would have been entitled to enjoy and receive for burials in a burial-ground provided for the said district of St. John, as if the burial-ground so provided by the said burial board were the burial-ground of St. John's district. He also claims to be entitled to fees for such monuments, gravestones, tablets, and monumental inscriptions erected or placed in the consecrated part of the burial-ground so provided by the said burial board as aforesaid, and in the chapel erected thereon, as may be so erected or placed over the remains or in memory of parishioners or inhabitants of the said district of St. John, in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets, and monumental inscriptions in a burial-ground provided for St. John's district, or in the said church of St. John.

17. If the Court should be of opinion that neither the said Clement Francis Cobb as the incumbent of St. George's district, nor the said William John Binder as the incumbent of St. John's district, has any right or title to fees as in the 15th and 16th paragraphs of this case is respectively mentioned, then the said Henry Josiah Day, as the incumbent of St. Mary's district, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township which before the said order in council of the 8th of August, 1831, formed one parochial chapelry as hereinbefore mentioned, as he claims in respect of parishioners or inhabitants of the said district of St. Mary, as in the 14th paragraph of this case is stated.

18. If the Court should be of opinion that the said Clement Francis Cobb, as incumbent of the said district of St. George, has the
*709] rights and is entitled to the *fees claimed by him as and in the 15th paragraph of this case is stated, but that the said William John Binder, as the incumbent of the said district of St. John, has no right or title to fees as in the 16th paragraph of this case mentioned, then the said Clement Francis Cobb, as incumbent of the said district of St. George, claims to have the same rights and to be entitled to the same fees in respect of parishioners or inhabitants of the whole of the district of St. George as it existed before the said district of St. John was formed out of it, as he claims in respect of parishioners or inhabitants of the said district of St. George as now existing, as in the 15th paragraph of this case is stated.

19. The said burial board, who are the defendants in the said several actions, deny that the plaintiffs or any of them have or has the rights, or are or is entitled to the fees, as above claimed by them respectively.

20. The questions for the opinion of the Court are, whether the plaintiffs, or any and which of them, have or has any, and if any what

rights, or are or is entitled to any, and if any what fees, as above claimed by them respectively.

21. Judgment was to be entered for 1*s.* damages and costs of suit (including one-third of the costs of this special case and the argument thereof) in each of the said actions in which the Court should decide in favour of the plaintiff in such action: and judgment was to be entered for the defendants, with costs of suit (including one-third of the costs of this special case and the argument thereof), in each of the said actions in which the Court should decide in favour of the defendants in such action.

Lush (with whom was *Kemplay*), for the *plaintiffs.(*a*)—The [*710 question in these cases turns upon the construction of certain

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That, from and after the consecration of the burial-ground provided by the burial board (except the portion thereof not intended to be consecrated), the said burial-ground became the burial-ground of the township of Barnsley; and the Rev. Henry Josiah Day, as the incumbent or minister of St. Mary's district, being an ecclesiastical district in the said township for which the said burial-ground was provided, became entitled to perform the duties and have the same rights and authorities for the performance of religious services in the burial in the consecrated portion of such burial-ground of the remains of parishioners or inhabitants of St. Mary's district, and also to receive the same fees in respect of such burials, as he had previously enjoyed and received for burials in the burial-ground of St. Mary's district, as if the burial-ground provided by the burial board were the burial-ground of St. Mary's district.

"2. That, from and after such consecration as aforesaid, he, the said Rev. Henry Josiah Day, became entitled to fees for such monuments, gravestones, tablets, and monumental inscriptions, erected or placed in the consecrated portion of the burial-ground provided by the board, or in the chapel erected thereon, as might be erected or placed over the remains or in memory of parishioners or inhabitants of St. Mary's district in lieu of the fees or sums which he would have been entitled to for the erecting or placing of such monuments, gravestones, tablets, or monumental inscriptions in the burial-ground or chapel of St. Mary's district:

"3. That, under the circumstances stated in the special case, the Rev. Henry Josiah Day is in respect of the consecrated portion of the burial-ground provided by the burial board an incumbent or minister within the meaning of ss. 32 and 33 of the 15 & 16 Vict. c. 85, so far as regards the burial in the consecrated portion of the burial-ground provided by the burial board, of the remains of parishioners or inhabitants of St. Mary's district, and the erecting or placing in such consecrated portion of the said burial-ground, or the chapel thereof, of monuments, gravestones, tablets, or monumental inscriptions over the remains or in memory of such parishioners or inhabitants:

"4. The Rev. C. F. Cobb and the Rev. W. J. Binder will rely on the same points in respect of St. George's district and St. John's district respectively, as are intended to be relied on by the Rev. H. J. Day in respect of St. Mary's district as above stated,—with this difference, that the Rev. W. J. Binder will contend that the fact of there never having been any burial-ground in and for St. John's district, does not affect the rights and authorities claimed by him in respect of the burial-ground provided by the burial board; and that he is in the same position as regards such rights and authorities as if there had been a burial-ground in and for St. John's district before and at the time of the consecration of the consecrated portion of the burial-ground provided by the burial board:

"5. In the event of the Court being of opinion that neither the Rev. C. F. Cobb, as the incumbent of St. George's district, nor the Rev. W. J. Binder, as the incumbent of St. John's district, has the rights and authorities claimed by them respectively, then the Rev. H. J. Day, as the incumbent of St. Mary's district, will contend that he has the same rights and is entitled to the same fees in respect of parishioners or inhabitants of the whole of the said township which before the order in council of 8th of August, 1831, formed one parochial chapelry, as he claims in respect of parishioners or inhabitants of St. Mary's district:

"6. In the event of the Court being of opinion that the Rev. C. F. Cobb, as the incumbent of St. George's district, has the rights and is entitled to the fees claimed by him in respect of St. George's district, but that the Rev. W. J. Binder, as the incumbent of St. John's district, has not the rights nor is entitled to the fees claimed by him in respect of St. John's district, then the Rev. C. F. Cobb, as the incumbent of St. George's district, will contend that he has the same rights and is entitled to the same fees in respect of parishioners or inhabitants of the

clauses in the Burial Act, 15 & 16 Vict. c. 85 (extended to the provinces by the 16 & 17 Vict. c. 134). The circumstances under which
*711] the question arises are these:—The township of *Barnsley maintains its own poor, and has separate overseers, though it is part of the parish of Silkstone. Down to August, 1831, it formed one parochial chapelry, called St. Mary's, having an ancient burial-
*712] ground. On the 8th of August, 1831, an order in *council was made, assigning a district to the church of St. George; and to this district of St. George's a burial-ground was attached. In 1844, a district called St. John's was carved out of St. George's district; and in 1858 a church called St. John's church was built. To St. John's district no burial-ground was provided; and the inhabitants of that district were interred in the burial-ground of St. George's. Under these circumstances, it can scarcely be contended that the incumbent of St. John's can sustain any claim for burial fees, &c. The argument must therefore be confined to the cases of the Rev. Mr. Day and the Rev. Mr. Cobb. When the burial board was established under the 20 & 21 Vict. c. 81, s. 4, neither of these districts of St. Mary or St. George was a place maintaining its own poor: the division was a mere ecclesiastical one. The scope and object of the 15 & 16 Vict. c. 85 was, to put an end to the interment of the dead in crowded places. The 2d section enacts, that, "in case it appear to Her Majesty in council, &c., that for the protection of the public health burials in any part or parts of the metropolis, or in any burial-grounds or places of burial in the metropolis, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for Her Majesty to order that after a time mentioned in the order burials in such part or parts of the metropolis in such burial-grounds or places of burial shall be discontinued
*713] *wholly, or subject to any exceptions or qualifications mentioned in such order," &c. The 10th section enacts, that, "upon the requisition in writing of ten or more rate-payers in any parish in the metropolis in which the place or places of burial shall appear to such rate-payers insufficient or dangerous to health (and whether any order in council in relation to any burial-ground in such parish has or has not been made), the churchwardens or other persons to whom it belongs to convene meetings of the vestry of such parish, shall convene a meeting of the vestry for the special purpose of determining whether a burial-ground shall be provided under this Act for the parish, &c.; and, if it be resolved by the vestry that a burial-ground shall be provided under this Act for the parish, a copy of such resolution, extracted from the minutes of the vestry, and signed by the chairman, shall be sent to one of Her Majesty's principal secretaries of state." By s. 11, in case the vestry agree to provide a burial-ground, a board is to be appointed. The 32d section enacts, that, "from and after the consecration as aforesaid (s. 30) of any burial-ground provided by this Act (except any portion thereof intended not be so consecrated), or where all or any part of such burial-ground, to by reason of the same having been already consecrated, shall not

whole of St. George's district as it existed before the said district of St. John was formed out of it, as he claims in respect of the parishioners or inhabitants of St. George's district, as now existing."

require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided; and, where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of *the parish* or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and *his curate, or such duly-qualified persons as [*714
such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of *the parish* of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received;" "and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parish." The 36th section provides, that, "where fees or any portions of fees payable on interments, or for any monument, gravestone, tablet, or monumental inscription in the burial-ground of any parish for which a burial-ground is provided alone or jointly with any other parish or parishes under this Act, are by law or custom payable to the churchwardens of any parish, or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any other debt or liability, such fees or portion of fees shall be payable in the burial-ground to be provided as aforesaid for such parish under this Act, and shall be received by the burial board, and paid to the parties entitled to receive the same; and when fees or payments have been received on interments, or for any monument, gravestone, tablet, or monumental inscription in the burial-ground of any such parish, by any such churchwardens, or by trustees or other persons, for the purpose of discharging any periodical payment or other liability, it shall be lawful for the burial board, upon the request of such churchwardens, *trustees, or persons, [*715
to pay from time to time out of the fees and moneys received by them on account of such parish, such amount as may be necessary for discharging such periodical payment or liability." By the interpretation clause, s. 52, it is declared that the word "parish" shall mean "every place having separate overseers of the poor, and separately maintaining its own poor;" and that "incumbent" or "minister" shall, "in respect of any fee made payable to an incumbent or minister under this Act, mean, the clergyman who would have been entitled to the fee, had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district, in case such district has a burial-ground at the passing of this Act; and, if any difference shall arise between two or more persons severally claiming to be the incumbent or minister under this provision, such difference shall be determined by the bishop of the diocese." The intention to preserve the rights

of incumbents, not only in parishes, but also in ecclesiastical districts, is obvious throughout the Act.

Manisty, Q. C. (with whom was *J. B. Maule*), for the defendant.(a)—

(a) The points marked for argument on the part of the defendant were as follows :—

"1. That the plaintiff the Rev. H. J. Day is not the incumbent or minister of a parish or place that has separate overseers of the poor, and separately maintains its own poor, and for which the burial-ground of the burial board of the township of Barnsley has been provided:

"2. That the said Rev. H. J. Day would not have been entitled to any fee for the burial in any churchyard or burial-ground of a parish or place having separate overseers of the poor, and separately maintaining its own poor, of the body of any inhabitant or parishioner of the district of St. Mary's, in the township of Barnsley, if such body had not been buried in the said burial-ground provided by the said Barnsley burial board for the said district:

"3. That the said burial-ground of the Barnsley burial board has been provided under the powers contained in the Burial Acts, but has not been thereby provided for any parish or place within the meaning of the said Burial Acts, having any incumbent or minister thereof:

"4. That the said Rev. H. J. Day, as the incumbent of St. Mary's district, in the township of Barnsley, has not any title in law under the said Burial Acts to perform the duties or to have the same rights or authorities for the performance of religious service in the burial in the said burial-ground of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. Mary's, nor is he entitled to receive the same fees in respect of such burials which he previously enjoyed or received, inasmuch as the said district of St. Mary's is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32:

"5. That the Rev. C. F. Cobb is not the incumbent or minister of a parish or place that has separate overseers of the poor and separately maintains its own poor, for which the said burial-ground of the Barnsley burial board has been provided:

"6. That the said Rev. C. F. Cobb, as the incumbent of the district of St. George's, in the township of Barnsley, would not have been entitled to any fee for the burial in any churchyard or burial-ground of a parish or place having separate overseers of the poor and separately maintaining its own poor, of the body of any inhabitant or parishioner of the said district of St. George's, if such body had not been buried in the said burial-ground provided by the said Barnsley burial board for the said district:

"7. That the said Rev. C. F. Cobb, as such incumbent, has not any title under the said Burial Acts to perform the duties, and have the same rights and authorities for the performance of religious service in the burial in the said burial-ground of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. George, nor is he entitled to receive the same fees in respect of such burials which he previously enjoyed or received, inasmuch as the said district of St. George is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32:

"8. That the Rev. W. J. Binder is not the incumbent or minister of a parish or place that has separate overseers of the poor and separately maintains its own poor, and for which the burial-ground of the township of Barnsley has been provided:

"9. That the said Rev. W. J. Binder, as the incumbent of the district of St. John's, in the said township of Barnsley, would not have been entitled to any fee for the burial in any churchyard or burial-ground of a parish or place having separate overseers of the poor and separately maintaining its own poor, of the body of any inhabitant or parishioner of the said district of St. John's if such body had not been buried in the said burial-ground provided by the said Barnsley burial board for the said district:

"10. That the said Rev. W. J. Binder, as such incumbent, has not any title under the said Burial Acts, to perform the duties and have the same rights and authorities for the performance of religious service in the burial in the said burial-ground of the Barnsley burial board, of the remains of parishioners or inhabitants of the said district of St. John's, nor is he entitled to receive the same fees in respect of such burials, which he previously enjoyed or received, inasmuch as the said district of St. John's is not a parish or place within the meaning of the 15 & 16 Vict. c. 85, s. 32.

"11. That no one of the said plaintiffs, as the incumbent of his respective district, is separately nor are any of the said plaintiffs jointly, entitled as such incumbents to the fees for the right of erecting, or for erecting, any monument, gravestone, tablet, or monumental inscription, in the said burial-ground provided for the several districts, or in the chapel erected thereon, which may be erected or placed over the remains or in memory of any of the parishioners or inhabitants of any of the said several districts under the provisions of the said Burial Act:

"12. That the said Rev. W. J. Binder is not minister or incumbent of any parish, place, or ecclesiastical district, which at the time of the passing of the 15 & 16 Vict. c. 85 had any burial-ground belonging to it, as such parish, place, or ecclesiastical district."

The right of Mr. Day and Mr. Cobb is *purely a statutory right. [*716
Unless it be given to them by the 15 & 16 Vict. c. 85, they can have no right at all. Each of them was the incumbent of a district church with a burial-ground attached to it, and each was before the passing of the statute entitled to the *fees for burials there- [*717
in. But for the statute, that was the beginning and the end of their right. The question depends on the 32d and 52d sections of the Act. The former enacts that the newly consecrated burial-ground shall thenceforth "be deemed the burial-ground *of *the parish* [*718
for which the same is provided," and that, "where the same is provided for *two or more parishes*, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish." Here, the burial-ground is provided for *one* parish, viz. Barnsley. The three ecclesiastical districts are in no sense "parishes." If the argument for the appellants were tenable, it would equally give a right to the fees to the incumbent of St. John's district, which had no burial-ground. [BYLES, J.—The language of the interpretation clause is clear,—"*Incumbent* and *minister* shall, in respect of any fee made payable to an incumbent or minister under this Act, mean the clergyman who would have been entitled to the fee had the body been buried in the churchyard or burial-ground of the parish from which it came, or in the burial-ground of the ecclesiastical district in case such district has a burial-ground at the passing of this Act."] The appellants are not bound to perform the duties in respect of which they seek to recover these fees. The burial board provide a chaplain for the purpose, and pay him. [*Lush*.—There is no clause in any of the Acts empowering the board to appoint a chaplain.] The 38th and 39th sections give such authority.(*a*)

**Lush* was not called upon to reply.

ERLE, C. J.—It appears to me that the incumbent of St. [*719
Mary's is entitled to the fees for the burial of every inhabitant of his district, and that the incumbent of the district of St. George is entitled to the fees for the burial of every corpse coming from that district or from the district of St. John, where they respectively perform the service. The township of Barnsley was a parochial district, having its own overseers, and maintaining its own poor, and therefore a "parish" within the meaning of the 15 & 16 Vict. c. 85. There had originally been one church (St. Mary's) and one burial-ground for the township. Afterwards a district church, called St. George's, was built, and a district with a burial-ground attached to it. Subse-

(*a*) The 38th section enacts that "the general management, regulation, and control of the burial-grounds provided under this Act, shall, subject to the provisions of this Act, and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same: provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese."

And the 39th enacts, that, "where a burial-ground is provided under this Act for the common use of two or more parishes, in case any question arise among the incumbents of such parishes as to the performance of the burial-service by a chaplain to be paid by means of contributions from such incumbents, or deductions from fees or sums payable to them, or otherwise touching the performance of service in the consecrated part of such ground, the bishop of the diocese shall from time to time confirm any arrangement, which a majority, or, in case of equal numbers, one half of the incumbents shall approve, and such arrangement so confirmed shall be binding upon all the parties concerned."

quently, a district called St. John's was carved out of St. George's district: and, though there were then three places of worship within the township, there were but two burial-grounds, viz., those of St. Mary
*720] and St. George, *and the burials of the inhabitants of St. John's district took place in the ground allotted to St. George's. In 1858, the board of health for the township of Barnsley, under the provisions of the 20 & 21 Vict. c. 81, established a new burial-ground: and the question for us is, who is to receive the fees for the performance of the burial-service there,—it being a burial-ground for the entire township of Barnsley. This depends upon the construction of the 32d section of the 15 & 16 Vict. c. 85, coupled with the interpretation clause, s. 52. It seems to me that the 32d section is capable of the construction which has been contended for on behalf of the incumbents Day and Cobb. That section enacts, that, "from and after the consecration of any burial-ground provided under this Act, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided; and, where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be) for which such burial-ground is provided, shall, by himself and his curate, &c., perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials, which he has previously enjoyed and received." It appears to me that the incumbent of each district having a burial-ground is entitled to the fees. Mr. *Manisty* insists that the words "every incumbent or minister of the parish," mean, the incumbent or minister of the whole parish, and that, as neither the
*721] incumbent of St. Mary's nor *the incumbent of St. George's is the incumbent of the parish of Barnsley, but each the incumbent of his own particular district only, therefore there is no one answering the description of "incumbent of the parish," so as to be entitled to demand these fees. But I take it that the incumbents of the district churches to which burial-grounds are attached are in some sense within the words, and certainly are within the meaning of the legislature; and that they are to perform the same duties, and to have the same rights and authorities, and entitled to the same fees in respect of burials which they had previously enjoyed. I think the statute clearly gives them a right to receive the same fees, and (though it is not necessary to decide that question here) imposes upon them the same duties, to which they were entitled and which they were bound to perform before in their respective districts. If they were bound to perform the service formerly, they are bound now: and, if they perform the service, they are entitled to receive the fees as heretofore. The language of s. 52 is clear to show that incumbent means and includes the clergyman of an ecclesiastical district having a separate burial-ground,—who would have been entitled to receive the fee if the body had been buried in the ground belonging to his district. If the fee is given to the incumbent of the

ecclesiastical district, it seems to me that the duty in respect of which it was payable was intended to be performed by the same incumbent.

BYLES, J.—I am of the same opinion. No one reading the statute can for a moment doubt that the ruling desire of the legislature was that the clergyman should not be deprived of any of the emoluments he was before entitled to, and that the public should have the same last service performed over them as heretofore. *If necessary, I think we are entitled, if not bound, to do some violence to [*722 the language of the Act, in order that that paramount intention should be carried into effect. But I do not think it is necessary to do any violence to the language here. The incumbents of these district churches were bound to perform certain duties and entitled to receive certain emoluments. Their performance of the former cannot be dispensed with, nor can they be deprived of their right to the latter, without clear and express words. The utmost that *could* be needed here, is, the substitution of the word "in" for "of" in the twelfth line of s. 82. But even that I do not think necessary. When you speak of "a bishop of the province of Canterbury," you mean a bishop who is beneficed in that province. The literal construction, therefore, of this statute is quite as consistent with our decision as any other.

The rest of the Court concurring,

Judgment for the plaintiffs Day and Cobb.

CHARLES LEE, Appellant; SAMUEL RILEY, Respondent.

May 5.

Through defect of fences which it was the defendant's duty to repair, his mare strayed in the night-time from his close into an adjoining field, and so into a field of the plaintiff's in which was a horse. From some unexplained cause, the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare, which broke his leg, and he was necessarily killed:—Held, that the defendant was responsible for his mare's trespass, and that the damage was not too remote.

A PLAINT was entered in the County Court of Yorkshire holden at Halifax, by the plaintiff (the now respondent) on the 10th of November, 1864, whereby he sought to recover the sum of 22*l.* The particulars attached to the summons served upon the defendant (the [*723 now appellant) claimed 22*l.* as "the price of a black horse."

The action was brought to recover the sum of 22*l.*, the value of a horse belonging to the plaintiff, which had had its leg broken in the night-time. The horse had been left safe and sound in the plaintiff's field on the evening of the 25th of October last, and was found the following morning standing there on three legs, the fourth having been broken, as was alleged, by the kick of a horse of the defendant's.

The plaint was tried before a jury: and it appeared in evidence that the plaintiff and defendant occupied two adjoining farms, and that an occupation-road extended from a highway through the defendant's farm, of which it formed part, into the plaintiff's farm, where it formed part of the plaintiff's farm, and terminated some two or three fields' length within the farm; that there was a gate across the occupation-road at the point where the two farms adjoined, which belonged to the

defendant to repair, and had been erected by the occupier of his farm immediately preceding him, some seven or eight years ago; and that, being broken in two pieces, the plaintiff had given notice to the defendant to repair it about three weeks before the occurrence which gave rise to the action, and had apprised him that it was his duty to repair it. It appeared further, that the defendant's horses, and particularly a large gray mare of his, had on several occasions passed through this gateway along the plaintiff's portion of the occupation-road, and thence through a small gateway opening from the occupation-road into a meadow-field of the plaintiff called the Rye Bank, and thence through a hedge into another field of the plaintiff called the Pasture, being the field in which the plaintiff's horse had been left sound and well on the evening of the day in question; that the last-
*724] mentioned *gateway was a small one (1½ yards wide) for the plaintiff's cows to enter the close called the Rye Bank, from the occupation-road; and that there was a gate reared against the opening, and stones placed against it on the field side, to support it; but that, if a horse pushed his breast against it, the gate would fall down; and it was in evidence that the defendant's horses (including the gray mare) had on several previous occasions pushed the gate down, and entered the plaintiff's land through the gap. It further appeared, that, on the night before the horse was found lamed, this gate had been fastened by one of the plaintiff's sons: further, that the hedge separating the two fields of the plaintiff (the Rye Bank and the Pasture) had been of sufficient strength during all the summer previous to prevent the plaintiff's cattle from passing out of one field into the other. This gate was found thrown down, and recent foot-marks of a horse were observed on the morning of the 26th of October on each side of it, and traced across the close called Rye Bank, and through the hedge into the field called the Pasture; and, in the latter field, close to where the plaintiff's horse was found standing on three legs, strong marks of horses "scuffling" were observed, and patches of black and of gray hair were found at the same spot, corresponding with the colour of the plaintiff's horse, which was black, and with that of the defendant's gray mare.

The plaintiff's horse was discovered standing on three legs, as before mentioned, at about 8 o'clock on the morning of the 26th of October; and, on being examined by a veterinary surgeon, it was found that the off hind-leg was broken, a compound fracture, and that a piece of the bone had been taken out. The horse was obliged to be killed; and, on a post-mortem examination, the bone exhibited an
*725] appearance of *having been struck, and a piece of it knocked out by a violent blow.

Such shoes as the defendant's gray mare had on, it was in evidence, might have caused it. The ordinary shoe of a horse would not have caused the injury; nor could the plaintiff's horse have caused the injury to itself.

About 12 o'clock the same day, the plaintiff's sons, accompanied by the veterinary surgeon, went to the defendant's stable, and there found his servant fomenting the off hind-leg of the defendant's gray mare with hot water. There were "abrasions," principally inside the thigh, down the leg, towards the hock. Hair was found knocked off in seve-

places; and the colour of the mare corresponded with that of the patches of gray hair found in the field.

The defendant's mare was a large powerful animal of 17½ hands high; and its shoes had attached to them large strong "caulkins," formed by the shoes being turned down at the heels. The plaintiff's horse was about 15 hands high.

There was no evidence of the defendant's mare being a vicious one.

No evidence was given on the part of the defendant, except as to the value of the plaintiff's horse.

A letter was put in, dated the 28th of October, 1864, from the plaintiff's attorneys to the defendant, charging the death of his horse to have been occasioned by a kick from the defendant's mare, and claiming compensation; to which no answer had been returned.

On the close of the plaintiff's case, the attorney for the defendant submitted that there was no evidence to go to the jury, and invited the Judge's attention to the case of Cox *v.* Burbidge, 13 C. B. N. S. 430.

The Judge decided there was evidence for the jury, and that it was not necessary for the plaintiff to prove *that the gray mare [*726 of the defendant was a vicious animal; that there was a distinction betwixt the two cases; that it might not be in the ordinary course of nature for a horse to kick a child, but that it was so for one horse to kick another, particularly a strange one, when they met in a field. And, on summing up to the jury he told them that the case depended mainly on circumstantial evidence; that there was no direct evidence bringing the plaintiff's horse in contact with the defendant's, and showing that the defendant's mare caused the injury; but that he thought there was sufficient evidence for them to take the case into consideration, and in the exercise of their judgment to consider whether sufficient grounds of complaint had been made out by the plaintiff; that the plaintiff was bound to furnish them with reasonable evidence from which they might presume that the defendant's mare was the cause of the accident: that that was one question; but, in order to make the defendant liable, supposing that his mare had done the mischief, it must be shown that the defendant's mare was wrongfully on the plaintiff's land; and that, if the defendant was bound to repair the gates, it was also his duty to keep his cattle from trespassing upon other persons' land. He then directed the attention of the jury to the fact that no evidence or explanation had been offered on the part of the defendant as to where the gray mare was on the night in question, or what she was doing; that he certainly expected that same evidence would have been adduced on this point; that it might be reasonably expected that some evidence would be given which would answer the presumption that the defendant's mare did the mischief; that where she was that night, and why the defendant's man was found fomenting the gray mare's legs, were circumstances which might reasonably have some weight in *the matter. He further [*727 told them that the three points for consideration were,—first of all, and mainly, did they think the circumstances given in evidence were sufficient to satisfy them that the defendant's mare caused the death of the plaintiff's horse? If so, then came the next question, whether the defendant was liable. His mare would become a trespasser as soon as it passed the gate leading to the plaintiff's portion

of the occupation-road. The main difficulty was, whether there was sufficient evidence to lead them to a conclusion that it was the defendant's mare that did the mischief. It was entirely a matter for their consideration. It did not require that the evidence should be as strong and exact as would be required to convict a man charged with murder; but still that it should be such reasonable evidence as men of ordinary capacity would act upon as between man and man. The question had arisen whether the defendant was liable, supposing that plaintiff did not give evidence of notice to the defendant that his mare was a violent animal. He was of opinion, he said, that had nothing to do with the present question. He added, that if the defendant's mare got into the plaintiff's field, whether the plaintiff's horse began to kick first or not did not affect the question, if the defendant's mare was a trespasser. And that it was for the jury to consider,—first, whether the death of the plaintiff's horse was caused by the defendant's mare, —secondly, whether the defendant's mare was trespassing,—and then the amount of damages.

The jury found a verdict for the plaintiff, damages 14*l.*

The defendant gave notice of appeal on the following grounds:—

"1. That there was no evidence to support the claim of the plaintiff:

*728] *"2. That the Judge was wrong when at the end of the plaintiff's case he determined that it was not necessary for the plaintiff to prove that the gray mare of the defendant was a vicious animal:

"3. That the Judge was wrong when at the end of the plaintiff's case he determined that there was evidence for the jury in support of the case, if the plaintiff proved that the gray mare of the defendant had committed a trespass by entering the fields of the plaintiff, and had whilst committing that trespass kicked the horse of the plaintiff:

"4. That the Judge misdirected the jury, and particularly when he observed that no evidence or explanation had been offered on the part of the defendant as to where the gray mare was on the night in question, or what she was doing, and that he certainly expected that some evidence would have been adduced on this point, and that it was reasonable to expect that the jury should have some evidence which would answer the presumption that the defendant's mare did the mischief; and further, when he said, that, whether the defendant's mare was a violent animal or not, he was of opinion that had nothing to do with the question, nor if the defendant's mare got into the plaintiff's fields, whether the plaintiff's horse began to kick first or not."

J. B. Maule, for the appellant.(*a*)—There was no evidence to

(*a*) The points marked for argument on the part of the appellant were as follows:—

"1. That the plaintiff below adduced no evidence of any cause of action against the defendant below (the now appellant) at the hearing of the plaint:

"2. That the road mentioned in the case as passing from the appellant's to the respondent's farm, was a public road, and not an occupation-road, as alleged:

"3. That there was no evidence given to support the statement that the gate across the said road at the point where the same road passes from the appellant's farm on to the respondent's farm was one belonging to the appellant to repair:

"4. That the verdict was against evidence, in this, that the fence mentioned in the case as dividing the respondent's closes therein respectively called Rye Bank and the Pasture, was proved to be, and is stated to have been, of sufficient strength during all the summer previous to

warrant the jury in finding that the defendant's mare did the damage complained of, or that the *defendant was legally liable, inasmuch as it was not proved that the mare was to his knowledge [*729 vicious or accustomed to kick other horses. This subject was very much discussed in the recent case of Cox *v.* Burbidge, 13 C. B. N. S. 430 (E. C. L. R. vol. 106). There, the defendant's *horse, being on a highway, kicked the plaintiff, a child who was playing [*730 there: there was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick: and it was held that there was no evidence from which a jury would be justified in inferring that the defendant had been guilty of actionable negligence. Erle, C. J., there says: "To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff. But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway, and that, without anything to account *for it, he struck out, and injured the plaintiff. I take the [*731 well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless

the time of the alleged cause of action, to prevent the respondent's and therefore also the appellant's cattle from passing into the "Pasture" in which the respondent's horse is said to have been found with his leg broken:

"5. That there was no evidence by what means the respondent's horse had broken his leg: and no proof was given of the appellant's mare ever having been in or near the respondent's 'Pasture Close' when the leg of the respondent's horse is said to have been there broken:

"6. That the respondent gave no evidence, even upon the assumption that the appellant's mare had strayed into the 'Pasture Close,' that the appellant knew that his mare was, or that his mare actually was, of a vicious nature and given to kicking, or had any tendency to acts of that kind, and to acts which are not in the ordinary course of the nature of a horse or mare to do:

"7. That the Judge, in summing up the plaintiff's case to the jury, erroneously told them that no evidence on the last head was required to support the plaintiff's cause of action:

"8. That the Judge was in error in telling the jury that some evidence should have been given by the appellant, and an explanation offered by him at the trial, as to where the appellant's mare was on the night in question, or what she was doing, to answer the presumption that his mare did the alleged mischief:

"9. That the Judge ought not to have left to the jury the question whether there was sufficient evidence to lead them to the conclusion that it was the appellant's mare that did the alleged mischief:

"10. That the Judge was in error in instructing the jury that the respondent not having given evidence of knowledge in the appellant that his mare was a violent animal, had nothing to do with the question:

"11. That the Judge should have told the jury that there was no evidence to support the respondent's plaint, or the alleged liability of the appellant in the said plaint:

"12. That the Judge should have told the jury that the gate leading into the close called Rye Bank of the respondent, opening from the alleged occupation-road, was proved and admitted by his own case to have been at the time in question out of repair and in a state insufficient to keep closed the small opening of the gateway, being reared only against such opening, and was a gate which was repairable by himself, and that by reason of the want of proper repair of such gateway, even upon the assumption of the respondent's own case, he had thereby, by reason of want of proper repair to such gate, contributed to the alleged mischief for which he sought to recover damages against the appellant."

the scienter can be proved." And Williams, J., says: "We must assume that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done. Taking that to be so, I am of opinion that the plaintiff cannot maintain the action, because he has not shown that the defendant knew that the horse was subject to that infirmity of temper. That brings the case within the ordinary rule, by which it is established that the owner is not liable unless it can be shown that he was aware of the irritable temper and vice of the animal." Willes, J., takes a somewhat wider range; but he winds up with saying,—"The important circumstance in this case is, that the act is not in accordance with the ordinary instinct of the animal, which was not known to be of a mischievous disposition." There was no evidence here that the defendant's mare was in the habit of kicking. Every one who knows anything about horses, knows that kicking is the exception. [KEATING, J., referred to Read *v.* Edwards, 17 C. B. N. S. 245 (E. C. L. R. vol. 112), where it was held that an action lies against the owner of a dog, who, knowing the animal to have a propensity for chasing and destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants which are being reared there under domestic hens.] There the scienter was proved.

*732] **Horace Smith*, contrà.(*a*)—In Cox *v.* Burbidge, the plaintiff failed to show the breach by the defendant of any legal duty. Here, however, there was abundant evidence of breach of duty in the defendant, in permitting his fences to be out of repair, and that, in consequence of that breach of duty, the mare strayed into the plaintiff's close and did the damage complained of: Star *v.* Rookesby, 1 Salk. 335. The Court there say: "Either trespass or case lies; trespass, because it was the plaintiff's ground, and not the defendant's; and case, because the first wrong was a non-feasance and neglect to repair, and that omission is the gist of the action; and the trespass is only consequential damage." In Powell *v.* Salisbury, 2 Y. & J. 391, the plaintiff declared in case against the defendant for not repairing his fences, per quod the plaintiff's horses escaped into the defendant's close, and were there killed by the falling of a haystack: and it was held that the damage was not too remote, and that the action was maintainable. Apart from viciousness, that case is not distinguishable from the present. Anonymous, 1 Ventr. 265, and Rooth *v.* Wilson, 1 B. & A. 59, are to the same effect. It was not a question whether the mare was vicious or not. The defendant would have been equally liable if the mare had lain down, and the plaintiff's horse had fallen over her and injured himself.

Maule, in reply.—Most of the cases referred to turned upon the question whether the injury was sufficiently proximate. Here, how-

*733] ever, the question *is, whether the liability existed in the first instance. This is not a claim for the consequential result of a trespass. If it had been a plaint for a trespass, the question of remote-

(*a*) The points marked for argument on the part of the respondent were as follows:—

"1. That there was evidence to go to the jury in support of the plaintiff's claim:

"2. That the defendant was liable for the injury done by his mare, whether the mare was vicious or not."

ness might have arisen. Here, however, it is expressly limited to the vice of the animal, and the owner's knowledge of that vice.

ERLE, C. J.—I am of opinion that our judgment in this case should be for the respondent. The action in substance is, either trespass for breaking and entering the plaintiff's close and doing damage there, amongst other damage, killing a horse belonging to the plaintiff, or an action upon the case for letting down a fence whereby the defendant's mare escaped into the plaintiff's field and so did the damage complained of. One or other of these is the form of action the plaintiff would have adopted if he had been proceeding in one of the superior Courts. In the plaint in the County Court, the cause of action is simply stated to be "one black horse;" but the evidence shows what the real cause of action is, and what it was that the judge of the County Court had in his mind in his summing up. It seems that the defendant's mare escaped in the night-time from his field, and passed into the plaintiff's close in which was the plaintiff's horse, and the two had a contest, in the course of which the defendant's mare broke the leg of the plaintiff's horse. The counsel for the defendant contended that the defendant was not liable, unless the plaintiff was prepared to prove that the defendant's mare was a vicious animal and that the defendant knew it: and he referred to Cox *v.* Burbidge, 13 C. B. N. S. 430, and that class of cases where it has been held, that, in the case of an injury done by a domestic or ordinarily tame animal, the owner is not responsible unless it is shown that the animal was ferocious or of vicious disposition, and that *the owner had notice of that [*734
vice and ferocity. I am of opinion that in this case it was not the duty of the Judge to lay down the law in that way to the jury, because the point put by Mr. *Maule*,—whose clear perceptions have doubtless led him to the conclusion that the decision we are about to pronounce is against him,—shows that the case is to be governed by a totally different principle. It is plain that the defendant's mare was trespassing on the plaintiff's close; and I think it is equally clear upon the evidence that the defendant's mare did inflict upon the plaintiff's horse the injury which was the cause of its death: the question is, whether or not the damage was too remote. The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question, because the act which upon the evidence must be presumed to have caused the injury was not one which was characteristic of vice or ferocity in the mare in the ordinary sense. The animal had strayed from its own pasture; and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. That constitutes the difference between this case and those relied on by the defendant, and supports the summing up of the judge, when he said that it was not a question of vice or scienter in the ordinary sense. That being disposed of, I think there was abundant evidence to warrant the jury in coming to the conclusion that the defendant's mare did trespass on the plaintiff's close, and there did the injury of which the plaintiff complained.

BYLES, J.—I am of the same opinion. I do not conceive it to be our duty in a case of this sort jealously to scan what the Judge in his

*735] summing up says to the *jury: we must look at the substance of it with reference to the complaint and the evidence before him. I think there was abundant evidence here that the defendant's mare was trespassing, and that the injury to the plaintiff's horse was caused by her kicking him either in sport or a quarrel, and that that kicking resulted in the horse's death. The proximate cause, therefore, of the plaintiff's loss was, the defendant's negligence. I can see but little difference between placing a horse with "caulkins" such as are described in this case in a field with insufficient fences, and turning a horse on a common so armed as to be dangerous to other horses, —in which latter case the defendant would undoubtedly be responsible for the consequences of his so doing.

KEATING, J.—I also think the appellant is responsible for the consequences of the trespass committed by his mare, and that the damage was not too remote. I see nothing that can fairly be found fault with in the summing up of the learned Judge.

MONTAGUE SMITH, J.—I am of the same opinion. The foundation of the action is negligence on the part of the defendant in omitting properly to keep up his fences, by means of which his mare strayed into the close of the plaintiff, and injured his horse. The only question is, whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious, and that the defendant knew it. I do not think it was necessary to give any such evidence. The accident might have happened without any vice in the mare; it might have been and probably was occasioned by the sudden meeting together of strange horses in the night-time. If even the plaintiff's horse com-

*736] mitted the *first assault, the plaintiff would under the circumstances I think have been equally liable. It was through his negligence that the horse and the mare came together. The damage complained of was the result of that meeting; and I think it was not too remote. Appeal dismissed.

COLES *v.* TURNER. *May* 5.

A stipulation in a trust-deed for the benefit of creditors, under the 192d section of the Bankruptcy Act, 1861, declaring that "it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they may have executed the deed, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration proved before the commissioners of bankruptcy, *or otherwise, as the said trustee or trustees may think fit*,"—is unreasonable, and renders the deed inoperative as against a non-assenting creditor.

THIS was an action against the defendant as the acceptor of a bill of exchange; with a count for goods sold and delivered, goods bargained and sold, work and materials, money paid, and money found due upon accounts stated.

The defendant pleaded, that, after the accruing of the causes of action in the said declaration mentioned, and before action, to wit, on the 19th of May, 1864, the defendant, being indebted to divers

persons respectively, made and executed a deed, which, without the signatures and attestations thereto, is as follows,—"This indenture made the 19th of May, 1864, between Richard Turner, of, &c., of the first part, George Molyneux, of, &c., of the second part, and *the several persons, Companies, and partnership firms who are creditors of the said R. Turner* (hereinafter called "the said creditors"), of the third part: Whereas the said R. Turner, being indebted to divers persons in divers sums of *money which he is unable to pay in full, has proposed to convey and assign all his real and personal estate, subject to the [*737 existing encumbrances thereon, to the said G. Molyneux, upon trust for the benefit of the creditors of him the said R. Turner in manner hereinafter contained, and the said creditors have agreed to give to the said R. Turner the release hereinafter contained: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, he the said R. Turner doth hereby grant, bargain, sell, convey, assign, and transfer unto the said G. Molyneux, his heirs, &c. (according to the nature and tenure thereof), all the freehold, copyhold, customary leasehold, and other real estate, tenements, and hereditaments of him the said R. Turner whatsoever and wheresoever, in possession, reversion, remainder, or contingency, and all the goods, stock-in-trade, plant, fixtures, household furniture and household effects, policies of insurance, moneys and securities for money, and all other the personal estate and effects of the said R. Turner whatsoever and wheresoever, in possession, reversion, remainder, or contingency (subject to the existing encumbrances thereon, and except the wearing apparel of the said R. Turner and of his wife and children), and all the estate, &c., with full power for the said G. Molyneux, his executors, &c., to demand, sue for, &c.: To have, hold, receive, and take all and singular the said real and personal estate, effects, and premises unto and by the said G. Molyneux, his heirs, &c. (according to the nature and tenure thereof), upon trust that he the said G. Molyneux, his heirs, &c., all of whom are hereinafter referred to as "the said trustee or trustees"), do and shall, as soon as may be, and in such way or manner as to him or them may seem best, call in, collect, and receive the said personal estate, effects, and premises, *and sell and convert into money all the saleable parts of [*738 the said personal estate, and all the said real estate (*with power nevertheless for the said trustee or trustees, in his or their discretion, to postpone the sale of all or any part thereof, and to lease such unsold portion either from year to year or for a term of years, for such rents as he or they may think fit*), and with power for the said trustee or trustees to make any such sales either by public auction or private contract, or partly in either mode, and either with or without the concurrence of any mortgagee or mortgagees of the property, and subject to such conditions, upon such terms, and generally in such manner as he or they may think fit (and, as to any policies of insurance, either by way of surrender to the office or offices which may have granted the same or otherwise); *and to give credit for the whole or any part of the purchase-money, either with or without taking security for the same:* And the said R. Turner doth hereby, for himself, his heirs, &c., covenant with the said G. Molyneux, his heirs, &c., that he the said R. Turner, his heirs, &c., will at all times hereafter, at the request of the said trustee or trus-

tees, and at the cost of the trust-estate, do, sign, and execute, or join or concur in doing, signing, and executing, all such acts, deeds, and documents as the said trustee or trustees may require for the purpose of giving effect to the conveyance and assignment hereinbefore contained, and carrying out the trusts and provisions of these presents: And it is hereby agreed and declared that the said trustee or trustees shall stand possessed of the moneys to arise from such calling in, collection, receipt, leasing, and sale as aforesaid (after payment thereout of all costs and expenses of and incidental to such calling in, collection, receipt, leasing, and sale), upon trust thereout in the first place to pay all costs, charges, and expenses of and incidental to the investigation
*739] *of the affairs of the said R. Turner, with a view to the preparation, execution, and registration of these presents, and procuring the signature or assents of the said creditors thereto; and in the second place to pay and discharge all costs, charges, and expenses, of and incidental to the carrying out the trusts and provisions of these presents (including therein any remuneration payable as hereinafter mentioned); and in the third place to pay and discharge rateably and without preference or priority the debts due and owing from the said R. Turner to the creditors, and to pay the surplus (if any) of the said moneys to the said R. Turner, his executors, &c.: Provided always, and it is hereby agreed and declared, that the said trustee or trustees shall have full discretion from time to time to determine the amount of dividends which shall from time to time be declared and paid out of the moneys in hand to and among the said creditors in respect of their respective debts, and *to pay such dividends at such place and in such manner as he or they shall think fit:* And it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees to require any person or persons claiming to be a creditor or creditors of the said R. Turner (notwithstanding that he or they may have executed these presents, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule hereto), *to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration proved before the Commissioners of Bankruptcy, or otherwise, as the said trustee or trustees may think fit:* And it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees to give time for the payment of any debt or debts owing to the said R. Tur-
*740] ner, and to accept payment thereof by instalments, composition, *or otherwise, and to abandon any debt or debts which he or they the said trustee or trustees shall consider bad; and also to make such arrangements as he or they may think expedient with any creditor or other person holding any portion of the estate and effects of the said R. Turner by way of mortgage, pledge, or lien, in order to redeem or discharge such mortgage, pledge, or lien, or to release the equity of redemption thereof, or otherwise: And it is hereby further agreed and declared, that it shall be lawful for the said trustee or trustees to employ any accountant, &c., and to pay him out of the trust-estate such a fair remuneration for services rendered as the said trustee or trustees may think fit: Provided always and it is hereby agreed and declared, that these presents shall not in anywise prejudice or affect the rights or remedies of any of the said creditors against

any surety or sureties, or any person or persons other than the said R. Turner, his heirs, &c., nor shall these presents in anywise prejudice or affect any security which any of the said creditors may have or claim for his debt; but, nevertheless, if such security shall be enforceable against the said R. Turner or his estate or effects, then and in that case such creditor, unless he shall consent to abandon the said security, shall be entitled to receive dividends under these presents upon so much only of his said secured debt as may remain after such security shall have been realized, or after credit shall have been given for the full value thereof, *such value to be agreed upon between the said creditor and the said trustee or trustees, or, in case of dispute, to be ascertained by two impartial valuers, one to be chosen by such creditor and the other by the said trustee or trustees, or an umpire to be named by such valuers before proceeding to the valuation:* And this indenture lastly witnesseth, that, in pursuance of the said agreement in this behalf, and in *consideration of the conveyance and assignment hereinbefore contained, the said creditors do hereby, for themselves and [*741 their respective heirs, &c., partners and successors, acquit, release, and for ever discharge the said R. Turner, his heirs, &c., estate and effects, of and from all the debts, claims, and demands of them the said creditors respectively, and of and from all actions, suits, and other proceedings at law or in equity which the said creditors respectively, or their respective partners or partner, have at any time heretofore brought, instituted, or taken, or which they the said creditors respectively or their respective heirs, &c., partners or successors, may or might (but for these presents) at any time hereafter bring, institute, or take against the said R. Turner, his heirs, &c., estate or effects, for or by reason or on account of such debts, claims, and demands, or any of them: Provided always, &c. [for the appointment of a new trustee]: And it is hereby agreed and declared that the receipt or receipts in writing of the said trustee or trustees for all moneys payable to him or them as such trustee or trustees shall effectually discharge all persons paying the same from all liability by reason of such payment, or of the misapplication or non-application of such moneys, and from all obligation to see to the application of such moneys; and that the said trustee or trustees shall not be answerable for the acts or defaults of each other, nor for any loss which may befall the trust-estate otherwise than through his or their wilful default respectively; *and that it shall be lawful for him or them to reimburse himself or themselves out of the trust-estate all costs and expenses actually incurred in the execution of the trusts:* And it is hereby lastly agreed and declared, that these presents are intended to be, and shall (so far as lawfully may be) operate as, a trust-deed for the benefit of the creditors of the said *R. Turner within the meaning of the provisions of the [*742 192d section of the Bankruptcy Act, 1861, in that behalf; and that it shall be lawful for the said trustee or trustees from time to time, at the expense of the trust estate, to institute, take, adopt, and defend all such actions, measures, suits, and proceedings as he or they may be advised, for the purpose of giving effect to these presents, and establishing the validity thereof as such trust-deed; In witness," &c.: Averment, that a majority in number, representing three-fourths in value, of the creditors of the defendant whose debts amounted

respectively to 10*l.* and upwards had in writing assented to and approved of the said deed; and that the trustee appointed by the said deed executed the same; and that the execution of the said deed by the defendant was attested by an attorney or solicitor; and that, within twenty-eight days from the day of the execution of the said deed by the defendant, and before action, the same was produced and left (having been first duly stamped) at the office of the chief registrar of the Court of Bankruptcy for the purpose of being registered; and that, together with such deed, there was delivered to the said chief registrar such affidavit as by the Bankruptcy Act, 1861, in that behalf was required; and that the said deed did before the registration thereof bear such ordinary and ad valorem stamp duties as by the said Act in that behalf was required; and that immediately on the execution of the said deed by the defendant, possession of all the property comprised therein of which the defendant could give or order possession, was given to the said trustee; and that, at the time of the execution of the said deed, the plaintiff was a creditor of the defendant in respect of the claim sued for, within the meaning of the said Act; *743] and that all other conditions prescribed by the said Act were observed and performed, and all *things were done and happened, necessary to give validity to the said deed as a deed under the Bankruptcy Act, 1861; and that the plaintiff became and was and is bound by the said deed as if he had been a party thereto and had duly executed the same.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being, "that the deed is not binding on the plaintiff, as it contains unreasonable provisions, and, amongst others, that the debts are to be proved as the trustees may think fit." Joinder.

Prentice, in support of the demurrer.(*a*)—The deed contains unreasonable provisions, and is therefore void as against a non-assenting *744] creditor. The property of *the debtor is assigned to trustees, in trust to sell for the benefit of the creditors, with power to them to postpone the sale indefinitely, and to lease the unsold portions of the property. This clearly is an unreasonable power to vest in trustees under a deed of this sort: it would be placing the creditors at the mercy of a friendly trustee, and giving the trustees powers which an assignee in bankruptcy could not exercise. The proviso that the trustees may pay the dividends at such place and in such

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed referred to in the plea is not binding upon non-assenting creditors under the Bankruptcy Act, 1861:

"2. That it is not so binding, as it contains unreasonable covenants and provisions: and the following, amongst others, are unreasonable provisions,—

"That the trustees may give unlimited credit,—that they may lease the property for any term they like, and are not bound to sell the same within a reasonable time,—that the trustees may pay the dividends at such place and in such manner as they shall think fit,—that the trustees may abandon debts due to the defendant, and make arrangements with persons holding mortgages, &c., without regard to the same being reasonable,—that the mode of valuing a creditor's security is unreasonable, it does not appear what is to be done if the creditor is a lunatic or an infant, or if the trustees refuse to appoint an arbitrator,—that the creditors are to prove their debts in such a way as the trustees may think fit,—that the trustees may reimburse themselves costs actually incurred, although the same were not reasonably incurred, and even though the same were improperly incurred:

"3. That the deed is not for the equal benefit of all the creditors."

manner as they shall think fit, is also unreasonable. So also is the stipulation that the trustees may require the creditors to verify the nature and amount of their debts or claims by statutory declaration, *or otherwise, as the trustees may think fit.* It might not be an unreasonable thing to require them to be proved before a Commissioner of bankruptcy: but the stipulation goes beyond that. A similar provision was held in Leigh *v.* Pendlebury, 15 C. B. N. S. 815 (E. C. L. R. vol. 109), to render the deed void. "I think," said Erle, C. J., "the clause giving the trustee power to admit or reject a debt which he might deem insufficiently proved, is most unreasonable, if carried out in terms. I must take the covenant, sitting in a Court of law, according to its legal effect. I cannot modify or alter it. It seems to me to be altogether unreasonable to call upon a creditor to submit his claim to the decision of the trustee." And Willes, J., said: "The deed contains, amongst others, the following clause,—'Provided, nevertheless, that it shall be lawful for the trustees or trustee for the time being to require the amount of any debt or debts of any of the several creditors, or any security for the same, to be verified by solemn declaration, or in such other manner as to such trustees or trustee shall seem expedient:' and, in the event of a refusal to submit to this, the creditor so refusing is to lose all benefit under *the deed. Is that reasonable? I must say I think it is not. There [*745 is nothing in any of the decisions to justify a non-executing creditor being thus placed at the mercy of the trustee." The provision also as to the mode of valuation of securities is objectionable. Suppose one party declines to appoint a valuer? Or, suppose the creditor, by reason of his being an infant or a lunatic or otherwise, unable to appoint a valuer? The release also is too extensive. Then, the power to the trustees to reimburse themselves all costs actually incurred, without reference to whether or not they were incurred reasonably, is too large: see Ex parte Whitchurch, 1 Atk. 210, and the 153d section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106.

Hannay, contrà.(*a*)—The stipulation that the trustees may reimburse themselves all costs actually incurred by them in the execution of the trusts, has passed unchallenged in many cases, and, amongst others, in Leigh *v.* Pendlebury, and also in Strick *v.* De Mattos, 33 Law J., Exch. 276. [ERLE, C. J.—If it were only costs, you probably might float.] As to the mode of proving debts, in Leigh *v.* Pendlebury the stipulation went beyond that contained in this deed; for, in the event of the creditor's refusal to submit to the inquisition, he was to lose all benefit under the deed: and the judgment turned very much upon that, which, it is submitted, is a very substantial distinction. In Ex parte Spyer, in re Josephs, 32 Law J., Bankruptcy, 62, a deed which contained a similar *clause was held good. Bram- [*746 well, B., in delivering the judgment of the Court in Strick *v.* De Mattos,(*b*) on this point says: "Clause 13, as to proof of debts,

(*a*) The points marked for argument on the part of the defendant were as follows:—"That the deed does not contravene the Bankruptcy Act; and that the powers given to the trustee are reasonable, and their exercise may be controlled by the Court of Bankruptcy."

(*b*) Strick *v.* De Mattos is now standing for judgment in the Exchequer Chamber. Trin. Vac. 1865.

was objected to, and it was said that by virtue of its provisions a creditor might be required, though at a distance, or under other circumstances of difficulty or unreasonableness, to make written statements of debt, and declarations under the statute. But the answer is, that this clause is not unreasonable because an attempt might be made to apply it unreasonably. We say an attempt, because it seems to us it would be a breach of duty in the inspectors to exact these statements and declarations in such cases as those put at the bar, and consequently that requisitions to that effect could not be enforced. As relating to an insolvency, when there is a large number of creditors, if honestly applied, as we are to assume it will be, this clause is not unreasonable." [BYLES, J.—There is no power given to the trustee to reject claims?] No. The words "or otherwise, as the said trustee or trustees may think fit," were introduced for the purpose of enabling the trustees to require less stringent proof. [ERLE, C. J.—I must say I do not see any substantial distinction between the deed in Leigh *v.* Pendlebury case and the present.] In Wells *v.* Hacon, 5 Best & Smith 196, 33 Law J., Q. B. 204, Cockburn, C. J., says: "If we see that the deed is unreasonable and contrary to the intention of the statute, it is not to be upheld: but, primâ facie, a deed agreed to by three-fourths of the creditors must be taken to be reasonable."

ERLE, C. J.—I am of opinion that our judgment in this case should be for the plaintiff. I think the provision here enabling the trustee or trustees to require *any person claiming to be a creditor to verify the nature or amount of his debt or claim, with full particulars showing the consideration thereof by statutory declaration proved before the Commissioners of Bankruptcy, *or otherwise as the trustee or trustees might think fit*, is a provision having exactly the same effect as the provision in Leigh *v.* Pendlebury. In both cases, unless the creditor proved his debt, he could not be entitled to dividends. In that case, we held that it was unreasonable that the creditor's failure to prove his debt as the trustees might choose should deprive him of his right to participate in the dividend. I for one am prepared to abide by that judgment: but, at the same time, I think it right to say that there are two or three other provisions in this deed which seem to me to be equally objectionable.

*747]

BYLES, J.—I am of the same opinion. The only difference between Leigh *v.* Pendlebury and the present case, is, that there the deed expressed the consequence which is implied here.

MONTAGUE SMITH, J.—I am of the same opinion. I think the case is not substantially distinguishable from Leigh *v.* Pendlebury.

Judgment for the plaintiff.

*THE GREAT WESTERN RAILWAY COMPANY, Appellants; JOHN CHARLES WILLIS, Respondent. [*748

May 5.

In an action against a railway company for not conveying cattle to market within a reasonable time, a County Court Judge allowed evidence to be given of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and a "night inspector" at one of the Company's stations, whose duty it was to forward the cattle, in which the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them:"—Held, that such evidence was improperly admitted,—it not being within the scope of the man's authority to make admissions as to by-gone transactions.

1. THIS was an action tried before the Judge of the County Court of Staffordshire, and a jury, at Wolverhampton. It was brought to recover 21*l.* 7*s.* 6*d.* for the non-delivery within a reasonable time of seven cows, thirty-five sheep, and six pigs, which were delivered to the defendants at Minety, on the 12th of July, 1864, to be carried to Wolverhampton,—the cows, sheep, and pigs being, as was alleged, thereby much injured, and the plaintiff put to expense, and the market at Wolverhampton being lost.

2. The cattle were delivered at the Minety station by the plaintiff about 5 P. M. on the afternoon of the 12th of July; the plaintiff paying the carriage charges, 3*l.* 11*s.*, and signing a consignment note in the following terms:—

"Cattle, sheep, and pigs. (Reduced rates.)

"To the Great Western Railway Company, Minety Station. July 12th, 1864.

"Receive from J. Willis, of, &c., the under-mentioned animals, on the conditions stated below, and at the special reduced charge below the rates authorized by law.

"To be sent to Wolverhampton Station.

"*Special Conditions.* The loading and unloading is to be performed by the sender, and any assistance voluntarily given by the Company's servants to be at the risk of the owner. The Company are not to be subject to any risk in the receiving, loading, forwarding, in transit, and unloading; nor to be answerable for any damage actual or consequential arising from suffocation, from being trampled on, bruised, or *otherwise injured, from fire or any other cause whatsoever, nor for any consequences arising from over carriage, detention, or delay in or in relation to the conveying or delivery of the said animals, however caused: [*749

"The Company is not bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market:

"If on the arrival of cattle and other animals at their destination no one shall be ready to receive the same on behalf of the consignee, the Company will at the discretion of the superintendent of any station send such animals into yards or other convenient places, at the expense and risk of the sender or consignee; and, if not claimed within seven days, the same will be sold to defray expenses and pay charges:

"In order to guard against disappointment, the public are recommended to give two clear days' notice of their intention to send cattle from any station, so that the Company may if possible provide trucks;

and, to afford time for receiving and loading such cattle and stock, they should be at the station not less than two hours before the departure of the train by which they are intended to be conveyed:

[Then followed a description of the cattle, &c., and the price charged for their carriage.]

"Free passes for drovers to take charge of cattle and other animals will be allowed, according to the Company's regulations.

"N. B. The conditions cannot be altered or dispensed with by any person whomsoever, and are applicable for the whole distance carried over the Great Western, the Bristol and Exeter, the South Devon, and the South Wales railways, and any other railway or conveyance in connection therewith, or with either of them."

*750] *Although the consignment-note is headed "reduced rates," and contains the language "at the special reduced charge below the rates authorized by law," there was no evidence upon the point, and indeed it had no reference to any higher scale of charges that was in operation.

3. The plaintiff proved that he saw the cattle loaded into trucks at Minety, ready for a goods train which usually leaves Minety about 7 P. M., that he had been in the habit of sending cattle by the defendants' railway for six or seven years, and that cattle loaded in time for that train usually arrived at Wolverhampton about 7 the next morning; that he and other cattle dealers had been in the habit of sending cattle to the Wolverhampton market by that train; that he informed the defendants' clerk at Minety that the cattle were intended for the next day's market at Wolverhampton; that he sent his man to meet the cattle the next morning by the first train, but they did not arrive by that train; that the next train was due at 10.30, but was late, and did not arrive till between 12 and 1; that witness was in the market all day, waiting the arrival of the cattle; that the cattle were brought up to the market by his man Grant about 1 or half past 1, when the market was over; that he then had the cattle turned out and fed, and sent them to the market at Birmingham the next day, where they were sold; and that, on their arrival, the cattle were very dirty and badly off for something to eat and drink, and were out of condition in consequence of the delay, and the sheep were also very dirty and out of condition in consequence of the delay.

"4. The plaintiff further proved that he lost some 17*l.* or 18*l.* by the lot of cattle between what they cost him and what he sold them for at Birmingham; and he attributed that partly to the depreciation

*751] in value *from delay, and partly to having lost the market at Wolverhampton.

5. The plaintiff then proposed to state something relating to the cause of the delay in delivering the cattle by the Company, which had passed in conversation about a week after the 12th of July between him and the defendant's night inspector, named East, at Didcot, through which station the trucks in which plaintiff's cattle were would pass, when the defendants submitted that a statement by a subordinate servant at Didcot, not in course of the transaction, but some time afterwards, was not admissible: but the learned Judge allowed the question to be put; and the plaintiff then stated that he said to

East, "How is it you did not send my cattle on?" and that he said in reply, that he had forgotten them.

The plaintiff also stated that East had the charge of the night cattle-trains at Didcot, and that he would be on duty when the trucks in which the plaintiff's cattle were would pass through Didcot, and that he knew East well, and had frequently seen him on duty at Didcot.

6. In cross-examination, the plaintiff was asked whether the cattle were not usually taken on by the empty coal-train from Didcot, which train, it was suggested by the defendants, was the one which left Minety at 7 in the evening and arrived at Wolverhampton about 7 A. M.; but the plaintiff said that his cattle were generally carried by the same train by which he sent his cattle on the 12th of July, and that other persons sent their cattle by the same train, and that the cattle usually arrived at Wolverhampton on the following morning a little after 7; that generally he got his cattle at Wolverhampton at about 7, and sometimes at 8, and sometimes at ½ past 10, or later.

7. He further stated that there was a fall in the *market between the 13th and 14th; and that the letter written by his [*752 attorney in answer to the defendants' goods manager's letter of the 27th of July, specifying the items composing the 21*l.* 7*s.* 6*d.*, was written by his directions,—the letter being as follows:—

"Exchange Chambers, Wolverhampton,
"July 27th, 1864.

Willis's Claim.

"Sir,—On the other side we send particulars, as requested.

"H. & J. E. UNDERHILL.

"A. Bell, Esq., Great Western Railway, Wolverhampton.

"7 cows made 1*l.* 15*s.* each less than they would have made at Wolverhampton market	12	5	0
"35 sheep made 3*s.* 6*d.* each less than they would have done at Wolverhampton market	6	2	6
"6 pigs made at least 1*l.* less than they would have made	1	0	0
"Extra expense of carriage to Birmingham, driving, and man, loss of time at Wolverhampton	2	0	0
	£21	7	6

8. The markets were all down after the Wednesday. It was contended by the defendants, that the true interpretation of this letter was, that the whole of the damages were originally claimed for loss of market only; but the plaintiff contended that the letter referred to damages from several causes, one of which was loss of market.

9. William Grant, the plaintiff's man, proved going to the station frequently on the early morning of the 13th of July, and that the cattle had not come up to 12 o'clock, when he left without them. He came down to the station about 10 minutes to 1, and they had just arrived; that he saw the train arrive; that he took the cattle out of the trucks, and took them into *the market at Wolverhampton at once; [*753 that the cattle were much out of condition in consequence of being kept so long in the trucks; that, when he got to the market, it was over, and he took the cattle and turned them out to feed against the next day.

10. In cross-examination he accounted for not feeding or watering the cattle before taking them into the market, by saying that there was no convenience at the station, and that he did not like to take them elsewhere for fear of losing any chance of selling them at the market.

11. The Wolverhampton cattle-market is usually over between 12 and 1 o'clock.

12. George Foxall, a cattle-salesman, proved seeing the cattle in Wolverhampton market, and that they were very dirty and out of condition, but that they would be all right again in the course of a week, by being properly fed and attended to.

13. The defendants upon this case submitted that the plaintiff ought to be nonsuited, having proved no breach of contract, and the Company not being bound to send the animals by any particular train, or to carry or deliver them within any certain or definite time, or in time for any particular market: but the learned Judge refused to nonsuit the plaintiff.

14. The defendants called two of the defendants' servants, who proved that there were only two trains by which the cattle could have arrived from Minety, by a return coal-train, which usually arrived at Wolverhampton at about 7 A. M., and a goods train which was timed to arrive at Wolverhampton at 10.30, but which was late on the morning of the 13th of July, 1864, and did not come in till a few minutes after 12; and that the cattle were delivered to the plaintiff's
*754] man without delay on arrival, and were not more *out of condition than cattle usually are after a journey in trucks by rail.

15. The learned Judge ruled that the special conditions relating to the non-liability of the defendants for detention or delay in conveying or delivering the cattle, were unreasonable, and left it to the jury to say whether there had been an unreasonable delay in the carriage and delivery of the plaintiff's cattle; and, if so, to find for the plaintiff for the agreed damages, 21*l.* 7*s.* 6*d.*, stating, at the request of the defendants, whether the damages were, loss of condition in the animals, or for loss of market.

16. The jury found for the plaintiff, that there had been an unreasonable delay, and assessed the damages for loss of market at 14*l.*, and injury to the condition of the cattle at 7*l.* 7*s.* 6*d.*

17. The questions for the decision of the Court, were,—first, whether the learned Judge was right in admitting the evidence of the conversation with East, set forth in the fifth paragraph,—secondly, whether the learned Judge was right in refusing to nonsuit the plaintiff, and whether he ought not to have ruled and directed that there was no evidence for the jury,—thirdly, whether the learned Judge was right in his direction to the jury.

T. J. Clark (with whom was *Digby*), for the appellants.(*a*)—The evi-

(*a*) The points marked for argument on the part of the appellants were as follows:—

"1. That the evidence of the alleged conversation with East was inadmissible:

"2. That the Judge was wrong in refusing to nonsuit, and ought to have ruled and directed that there was no evidence to go to the jury in support of the plaintiff's case:

"3. That the conditions in the consignment-note, having been duly signed, constituted a valid special contract, and under the circumstances stated afforded a defence to the action:

"4. That it was not competent for the Judge, under the circumstances, to adjudge the

dence of what was said by East, the *night inspector, clearly was inadmissible: it was no part of his duty to make admissions hostile to the interest of his employers. The learned Judge's construction of the consignment-note was also erroneous. It was a special contract which it was perfectly competent to the parties to make. [*755

Macnamara, for the respondent, was called upon to support the ruling of the Judge.(*a*)—Where a person has the general control and superintendence of a particular department of the great business of a railway company, it would be extremely inconvenient to hold that he is not the agent of the Company for the purpose of answering inquiries made by one having an interest in the matter inquired into. Such a person *necessarily stands in the position of one to whom the public are referred by the Company for information. If so, anything said by him within the scope of his authority would be evidence against the Company. In a more especial manner is this so in the case of a corporate body, who can only speak by the mouths of its agents. The case comes directly within the dictum of Tindal, C. J., in Garth *v.* Howard, 8 Bingh. 451 (E. C. L. R. vol. 21), 1 M. & Scott 628 (E. C. L. R. vol. 28), where the question was whether the declarations of a shopman were evidence against his employer. "If," said that learned Judge, the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker." There, as here, the statement was made after the transaction. So, in Clifford *v.* Burton, 1 Bingh. 199 (E. C. L. R. vol. 8), 8 J. B. Moore 16 (E. C. L. R. vol. 16), where a wife served in her husband's shop, and carried on the business of it in his absence, admissions made by her on application for payment for goods before delivered at the shop, were held to be receivable in evidence against her husband. There are many cases where statements made by an agent or servant in the ordinary scope of his authority in the conduct of his master's business are admissible against the master. [*756

ERLE, C. J.—I am of opinion that this night inspector is not to be presumed to have had authority to made admissions relative to trans-

conditions to be unjust or unreasonable under the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31:

"5. That the conditions were just and reasonable; and, at all events, if bad in part, were severable, and afforded a defence to a portion of the claim:

"6. That the Judge was wrong in his direction, and that he ought to have directed the jury to find for the defendants, or, at all events, to return a verdict for them in respect of so much of the claim as was answered by the conditions."

(*a*) The points marked for argument on the part of the respondent were as follows:—

"1. That the conditions in the consignment-note were unreasonable:

"2. That there was evidence to go to the jury of negligence on the part of the Company:

"3. That evidence of the statement made by the night inspector, East, was admissible:

"4. That, notice having been given to the defendants' agent at Minety station that the cattle were intended for the next day's market at Wolverhampton, damages were recoverable for the loss of the market."

*757] actions gone by, so *as to bind his employers. I think neither of the cases cited has any application here. I therefore think there must be a new trial, and that the appellants are entitled to costs.

The rest of the Court concurring, Rule accordingly.

BLIGHT *v.* GOODLIFFE and Others. *May* 11.

Interrogatories under the 51st section of the Common Law Procedure Act, 1854, in an action for a false and fraudulent representation on the sale of a business.

THIS was an action brought by the plaintiff to recover damages for misrepresentation of the value and profits of the business of a ship and insurance broker sold by the defendants to the plaintiff, and to recover back the sum of 5000*l.* paid by him to the defendants as the consideration for such sale.

Sir G. Honyman, on a former day in this term, obtained a rule calling upon the defendants to show cause why the plaintiff should not be at liberty to deliver to them or to their attorney interrogatories in writing under the 51st section of the Common Law Procedure Act, 1854. The affidavit upon which the application was founded,—by the plaintiff and his attorney,—stated that the plaintiff had a good cause of action against the defendants on the merits; that they believed the plaintiff would derive material benefit in this cause from the discovery which he sought to obtain by the interrogatories proposed to be exhibited for the examination of the defendants; that, previously to the plaintiff's purchasing the said business, and for the *758] purpose of inducing him to do so, F. G. *Goodliffe, one of the defendants, produced to him a certain book which he alleged contained accurate entries of the net amount of profits which the defendants, or some of them, had made in respect of the said business during a period of about fourteen or fifteen years, and the said F. G. Goodliffe also urged him to purchase the said business, and to do so promptly, on the ground that another party was desirous of having the business, and that the said defendant was authorized by such other party to offer the plaintiff a check for 250*l.*, to relinquish the negotiation in his favour; that the plaintiff believed that the entries in the said book so produced to him as aforesaid were untrue, and that the defendants had not been authorized to offer him 250*l.* in manner aforesaid; and that he was advised and believed that it was material and necessary, for the purpose of establishing his case in this action, that the defendants should be required to answer the said interrogatories.

The matter had already been before a Judge at Chambers, who had allowed certain interrogatories, but declined to allow the following,—

"Does the book produced and shown by you to the plaintiff contain accurate entries of the earnings of your business of ship and insurance brokers during the period comprised therein?

"Is it not true that you stated to the plaintiff that you were authorized by a certain person to offer him 250*l.* to relinquish the negotiation for the purchase of your business in his favour? and was not that statement false?

"Did any person so authorize you? and, if so, what is the name of the person who so authorized you?"

Murphy now showed cause.—He submitted that the above interrogatories had been properly disallowed.

*Sir *G. Honyman*, in support of his rule, insisted that the interrogatories were such as the statute contemplated should be allowed; that the statement as to the 250*l.* was not simplex commendatio; and that the plaintiff ought not to be shut out from proving it in any way he could. [*759

PER CURIAM.—We thing the proposed interrogatories ought to be allowed. Rule absolute.

BARKER and Another *v.* M'ANDREW. *May* 16.

By a charter-party it was agreed that the ship (then at Newcastle), "being tight, staunch, and strong, and every way fitted for *the voyage*," should with all convenient speed "sail and proceed to the usual loading place, guarantied for cargo in all this month (October), or so near thereunto as she might safely get, and there load in the customary manner a full and complete cargo of coal," and, being so loaded, should proceed therewith to Alexandria, and deliver the same on being paid certain freight,—"the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, *rivers*, and navigation of whatever nature and kind soever *during the said voyage* always excepted."

To an action upon this charter-party, alleging for breach that the vessel was not ready to receive, and did not in fact receive the agreed cargo until long after the time stipulated, the defendant pleaded, that, at the time of the making of the charter-party, the vessel, so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail and proceed, and before reaching such usual place would necessarily be exposed to divers dangers of seas, rivers, and navigation,—all which the plaintiffs and defendant at the time well knew; that the voyage in the charter-party mentioned was a voyage from the place at Newcastle at which the vessel was at the time of making it to the said usual place for loading, and from thence to Alexandria; and that the vessel, during the said voyage, that is to say, during such part of the said voyage as took place before she sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of the charter-party, was hindered and prevented by the dangers of seas, rivers, and navigation then happening, from receiving on board and from being ready to receive on board the residue of the said cargo, &c.:—

Held, that the plea was a good answer to the action,—the exception in the charter-party applying as well to the preliminary transit of the vessel to the place of loading as to the subsequent part of the voyage.

Held also, that the expression in the charter-party, "*guarantied* for cargo in all this month,"—which was admitted to mean "ready to receive cargo within the month,"—did not take the case out of the exception.

THIS was an action against a shipowner for not having the vessel ready to load pursuant to the guarantee contained in a charter-party.

*The first count of the declaration stated, that, by a charter-party, dated the 3d of October, 1863, it was mutually agreed between the plaintiffs and the defendant, that the defendant's steamer called the Smyrna, then at Newcastle, should with all convenient speed sail and proceed to the usual place of loading there, or so near thereunto as she might safely get (the defendant guaranteeing the said steamer for cargo in all the said month of October), and there load from the factor of the plaintiffs, in the customary manner, a full and complete cargo of about 1500 tons of coal; and that, being so loaded, [*760

the said steamer should therewith proceed to Alexandria, Egypt, and there deliver the same on payment of freight,—the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, *rivers*, and navigation, of whatever nature and kind soever during the said voyage always excepted: Averment, that the plaintiffs did all things on their part to be done, and all things happened, to entitle them to have the said charter-party performed by the defendant on his part: Breach, that the said steamer did not with all convenient speed sail and proceed to such usual place of loading at Newcastle as before mentioned, nor was the said steamer ready to receive and load on board the said agreed cargo during any time in the said month of October: and the plaintiffs in fact said that the said steamer was not ready to receive and load on board, and did not in fact receive and load on board, the said agreed cargo, until long after the said month of October, and after a long and unreasonable delay.

The second count stated that it was mutually agreed between the plaintiffs and the defendant that the defendant's steamer called the Smyrna, then at Newcastle, should with all convenient speed sail and proceed *to the usual place of loading there, or so near thereto as she might safely get, being ready there for cargo in the month of October or the early part of the month of November, 1863, and there load from the factor of the plaintiffs, in the customary manner, a full and complete cargo of about 1500 tons of coal; and that, being so loaded, the said steamer should therewith proceed to Alexandria, Egypt, and there deliver the same on payment of freight, the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever during the said voyage always excepted: Averment, that the plaintiffs did all things on their part to be done, and all things happened, to entitle them to have the said agreement performed by the defendant on his part: Breach, that the said steamer did not with all convenient speed sail and proceed to such usual place of loading at Newcastle as before mentioned, nor was the said steamer ready to receive and load on board the said agreed cargo during any time in the said month of October or in the early part of the said month of November: and the plaintiffs in fact said that the said steamer was not ready to receive and load on board, and did not in fact receive and load on board, the said agreed cargo until long after the early part of the said month of November, and after a long and unreasonable delay: and, by reason of the premises in the first and second counts respectively mentioned, the plaintiffs were prevented from receiving the said cargo at Alexandria aforesaid, and from selling and disposing of the same there, until long after the time when the same might and would according to the said charter-party and agreement respectively have been delivered there, and lost the opportunity of selling and disposing of the said cargo at a profit, and were compelled to sell *and dispose of the same at a loss, and were otherwise delayed and put to great additional expense upon and about the said cargo: Claim, 3000*l.*

*761]

*762]

The defendants pleaded,—fourthly, that the charter-party in the first count mentioned was and is as follows:—"London, 3d October,

1863. It is this day mutually agreed between Messrs. R. M'Andrew & Co., of the good ship or vessel called the new steamer Smyrna, of the burthen of —— tons or thereabouts, now at Newcastle, and Messrs. J. Barker & Co., of London, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all *convenient speed sail and proceed to the usual loading place, guaranteed*(a) *for cargo in all this month*, or so near thereunto as she may safely get, and there load from the factor of the said freighters, in the customary manner, a full and complete cargo of about 1500 tons of coal, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and, being so loaded, shall therewith proceed to Alexandria, Egypt, or so near thereto as she may safely get (cargo to and from alongside and at merchant's risk and expense) and deliver the same on being paid freight as follows, 30*l.* per keel of 21 tons and one-fifth, with fifteen guineas gratuity, in full of all port-charges and pilotage (the act of God, the Queen's enemies, restraints of princes and rulers, fire, *and all and every other dangers and accidents of the seas, rivers, and navigation of whatever kind soever during the said voyage always excepted*); the vessel to be addressed to the charterers' agents, paying the one usual consignment commission of 2 per cent., and to have a lien on cargo for all freight, dead-freight, and demurrage. Captain to sign bills of lading at any rate of freight, *without prejudice to this charter. Freight to be [*763 paid on unloading and right delivery of the cargo, in cash at current exchange: 125 tons to be allowed the said merchant per weather working day (if the ship is not sooner despatched) for unloading, and all days on demurrage over and above the said laying days at 30*l.* per day. Penalty for non-performance of this agreement, estimated amount of freight. The brokerage at 5 per cent. by the ship on account of freight, primage, and demurrage, is due, on signment of this agreement, to William Nance." Averment, that the agreement in the second count mentioned was the same charter-party, with an extension of time mutually agreed on by the plaintiffs and the defendant for being ready for cargo until the early part of November, 1863: that, at the time of the making the said charter-party and agreement in the first and second counts respectively mentioned, the said steamer, so being at Newcastle as in those counts mentioned, was at a place there far distant from the usual place there for loading, to which the said steamer was to sail and proceed, and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers, and navigation, all which the plaintiffs and defendant at the said time well knew; and the said voyage in the said charter-party mentioned and referred to was a voyage from the place at Newcastle at which the said steamer was at the time of making the said charter-party and agreement to the said usual place at Newcastle for loading, and from thence to Alexandria; and that the said steamer, during the said voyage, that is to say, during such part of the said voyage as took place before the said steamer sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of

(a) *i. e.*, so as to be ready.

*764] *the said charter-party or agreement, was hindered and prevented by the dangers of seas, rivers, and navigation then happening, from receiving and loading on board, and from being ready to receive and load on board, the residue of the said cargo, and was thereby greatly and necessarily delayed therein, which were the supposed breaches of contract in the first and second counts respectively complained of.

The plaintiffs demurred to the fourth plea, the ground of demurrer stated in the margin being, "that, according to the true construction of the charter-party, the voyage had not been commenced at the time when the steamer was hindered and prevented as in that plea mentioned, and consequently that the exception did not apply." Joinder.

H. Lloyd (with whom was *Biron*), in support of the demurrer.(a)—This was an absolute guarantee that the vessel should be ready to load at all events in October, or the beginning of November: the excep-

*765] tion did not *attach until the voyage had commenced. Crow *v.* Falk, 8 Q. B. 467, is expressly in point. There, the plaintiff and defendants agreed by charter-party that a ship, then at Liverpool, of which the plaintiff was master, should with all convenient speed be made ready, and should at Liverpool receive and load from the charterers' agents a full cargo, and, being so loaded, should proceed to Stettin and deliver the same, and so end the voyage,—restraints of princes, &c., "during the said voyage" always mutually excepted; and the ship was to be loaded at Liverpool without detention; and the defendants thereby agreed to load the vessel at Liverpool as in the charter-party stated, with the said cargo at Liverpool. On general demurrer to an action assigning for breach of the above agreement that the defendants did not load the ship at Liverpool without detention, but detained her at Liverpool an unreasonable time (not negativing restraints of princes, &c.,—it was held that the exception as to restraints of princes, &c.), was applicable only after the ship quitted Liverpool. It was suggested in argument there that "a policy would not attach till the anchor was weighed, unless it contained the word 'at' as well as 'from.'" And, in giving judgment, Lord Denman says,—"The voyage could not begin before the ship's loading was completed: the exception is confined to the time during the voyage." That has been followed by two cases, viz., Bruce *v.* Nicolopulo, 11 Exch. 129,† which questioned it, and Valente *v.* Gibbs, 6 C. B. N. S. 270, which approved of it. In Valente *v.* Gibbs, by a charter-party it was agreed that the ship, then lying at Genoa, should sail, "on or before the 30th of July, 1856," to Monte Video and Lima (with goods for third parties), and thence proceed with all convenient despatch to

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the guarantee as to the vessel taking or being ready for cargo is absolute and unconditional, and is not controlled by the subsequent exception:

"2. That the exception relates and applies only to the carriage and delivery of the cargo, and not to the loading it on board, or at any rate not to the being *ready* to receive and load it:

"3. That the exception applies and takes effect only *during the voyage;* and that, at the time when the steamer was hindered or prevented as in the fourth plea mentioned, the voyage contemplated by the parties had not according to the true construction and effect of the charter-party commenced: see Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), and Valente *v.* Gibbs, 6 C. B. N. S. 270 (E. C. L. R. vol. 95):

"4. That, for the above reasons, the fourth plea is no answer to the declaration, and is bad in substance."

Callao, where the master was to report his arrival to the agents of *the charterers, by whom he was to be sent to the Chincha [*766
Islands for a cargo of guano for a port in the United Kingdom. Thirty days were to be allowed to the charterers for loading the ship, and to the owners for taking in certain specified light freight, and thirty days over and above the lay days, at 7*l.* per day; and then came the following provision,—"Should the vessel be unnecessarily delayed *at any other period of the voyage*, such detention to be paid for by the party delinquent to the party observant, at the above-named rate of demurrage or compensation." *The vessel did not leave Genoa until the 8th of September:* and it was held that this was not a detention "during the voyage" within the meaning of the penalty clause. Cockburn, C. J., there says: "The word 'voyage' has a well-recognised meaning, and has on various occasions received a legal interpretation. Still, no doubt, it is susceptible of a certain degree of flexibility; and, if the context clearly showed that it was intended by the parties to have a larger meaning than that which in common parlance belongs to it, we must so construe it. But, unless we can see beyond all doubt that the word is not used in its ordinary sense, we must give it its generally received signification. I see nothing in this case to justify us in holding that it means more than the transit from the terminus à quo to the terminus ad quem. The case of Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), is an authority in point: and, although it seems to have been reflected on by the Court of Exchequer in Bruce *v.* Nicolopulo, 11 Exch. 129,† it was not necessary on that occasion to overrule it, and I for one am not disposed to dissent from it." Crowder, J., said: "I incline to think that the voyage here agreed on is the voyage which commenced at Callao, as was contended by Mr. *Wilde*. The charterers had no interest in the intermediate voyages. It is, however, unnecessary to *decide that; for, I think it is quite clear upon the language [*767
of the charter-party that the voyage did not in any sense commence before the ship left the port of Genoa; and that is sufficient to entitle the plaintiff to judgment." And Willes, J., said: "The charter-party contains a stipulation that the vessel shall sail from Genoa on or before the 30th of July, 1856. When she sails, the voyage commences. Before her departure, no voyage exists to which the penalty could attach. In Bruce *v.* Nicolopulo,—upon which the defendant will rely,—the plaintiff and defendant agreed by charter-party that the plaintiff's ship should, after discharging her outward cargo, proceed to Galatz or Ibraila, as ordered at Constantinople by the charterer's agents, and there receive a full cargo of wheat; and, being so loaded, should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, and deliver the same agreeably to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas, &c., *during the said voyage*, always mutually excepted). The vessel, after discharging her outward cargo, proceeded to Constantinople; and, in consequence of orders there given by the defendant's agent, the master took the vessel to Ibraila. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat. And it was held that the exception of the

restraints of princes, &c., applied whilst the vessel was at Ibraila. The Lord Chief Baron thus summarily disposes of Crow *v.* Falk,—"I have read the case of Crow *v.* Falk, and cannot subscribe to it." And Martin, B., says: "Assuming the case of Crow *v.* Falk to be good law, this case is clearly distinguishable, because here the ship was to go to Constantinople, and from thence to Galatz or Ibraila, as ordered
*768] by the charterer's agents at *Constantinople. Therefore, by the contract, the ship was to be in one sense on her voyage from the time of leaving Constantinople." The question is whether the present case is to be governed by Crow *v.* Falk and Valente *v.* Gibbs, or by Bruce *v.* Nicolopulo. The plea does not deny that the vessel was not ready within the time stipulated. It is admitted that she was not ready: some coals were put on board, but only for the purpose of stiffening her, in order that she might safely proceed to the spout. The "voyage" to which the exception applies is that which commences on the vessel breaking ground with her intended cargo on board,—like a voyage insured "from" a given port to a given port. The object of the charter-party was, the conveyance of a cargo of coals from Newcastle to Alexandria. [WILLES, J.—The charter-party obviously contemplates that there are dangers to be encountered in getting to the spout: it excepts a certain class of dangers.] At all events, the charter-party contains an absolute guarantee that the vessel shall be at the loading place ready to receive cargo during all the month of October, which clearly takes it out of the exception. The obligations which the shipowner contracts are four,—1. That the ship shall proceed with all convenient speed to the usual loading place, and be there ready to receive her cargo in the month of October,—2. That she shall take on board a full cargo of coal,—3. That, being fully laden, she shall proceed with her cargo on the voyage contemplated,—4. That, on her arrival at Alexandria, her port of destination, she will deliver the coals, on payment of the stipulated freight. Then comes the exception,—"The act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the said voyage always
*769] excepted." *[BYLES, J.—The coal taken on board before the vessel got to the spout was part of the cargo she was to carry to Alexandria?] It must be so assumed. [MONTAGUE SMITH, J.—The words "with all convenient speed," which are material, form part of the guarantee. WILLES, J.—It is consistent with the plea, that the damage was sustained after the vessel arrived at the spout. The breach can only be read as stating what is necessary: special matter must be replied: Butt *v.* The Great Western Railway Company, 11 C. B. 140 (E. C. L. R. vol. 73).] That which is complained of here, is, the breach of the first of the obligations above mentioned. The exception could not apply to any time anterior to the ship's starting loaded. The words "during the voyage" are wholly inapplicable to this portion of the risk.

Rew, contrà.(*a*)—Two questions arise here,—first, whether the

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That the plea brings the alleged breach of contract within the exception of the dangers of the seas, &c., contained in the charter-party, and so contains a complete defence:

words of the exception "during the said voyage" exclude the peril on which the fourth plea is founded,—secondly, whether the guarantee that the vessel shall be ready at the spout during the whole of *October (or the extended period), altogether takes the case out of the operation of the exception. [*770 Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), is relied on to show that "voyage" means the period commencing after the sailing of the vessel on the adventure contemplated. Neither that case nor Valente *v.* Gibbs, 6 C. B. N. S. 270 (E. C. L. R. vol. 95), was intended to convey any such notion. In the former case, the voyage could not in any sense be held to commence before the sailing of the ship from Liverpool; and, in the latter, the detention at Genoa was a detention long before the charter-party attached. Bruce *v.* Nicolopulo, 11 Exch. 129,† is precisely in point, and cannot be distinguished from this case. As a general rule, the voyage is the journey which the contract requires the ship to take for the benefit of the charterers. Much stress is laid on the word "guaranteed." It may import a condition, but it does not exclude the application of the exception. [WILLES, J.—Who puts the vessel on the "turn-book" under the Tyne Acts? (*a*)] Either party may do it.

H. Lloyd, in reply.—Looking at the analogy of cases on policies of insurance, the "voyage" commences only from the time the vessel breaks ground.

WILLES, J.—I am of opinion that our judgment should be for the defendant. The action is founded upon a charter-party by which it was agreed that the ship Smyrna, then at Newcastle, should with all convenient speed proceed to a loading place so as to be ready to receive a cargo of coals in the month of October,—altered by a subsequent agreement to the beginning of November, and proceed therewith to Alexandria. The charter-party contained the usual exceptions of the act of God, the Queen's enemies, *restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, *rivers*, and navigation *during the said voyage*. From the facts disclosed upon the record, it should seem that the vessel broke ground for the purpose of proceeding to a usual place of loading. I assume that it is not clear from the pleadings whether she arrived there or not; but it is clear that the vessel did break ground and took some cargo on board, and did proceed towards the place of loading, and, if she did not arrive there so as to take on board the remainder of her cargo, she was prevented from so doing by a danger or accident of the seas, rivers, and navigation. The question arises whether it can be said that the voyage contemplated in the exception included the preliminary transit from the place in which the vessel was at the time the charter-party was made, to the loading place. And then [*771

"2. That such exception extends to everything to be done on the part of the shipowner during the voyage:

"3. That the terms of the charter-party are, under the circumstances stated in the plea, quite consistent with the voyage commencing at the place where the vessel was before sailing to take in her cargo; and, as the plea expressly alleges the voyage to have commenced there, the excepted dangers are shown to have occurred during the voyage:

"4. That the allegations in the plea bring the question as to the commencement of the voyage within the authority of Bruce *v.* Nicolopulo, 11 Exch. 129,† rather than that of Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55)."

(*a*) See 8 & 9 Vict. c. lxxii.

arises a second question, viz. whether, assuming that was part of the voyage, the use of the word "guaranteed" in the clause which stipulates that "the vessel shall with all convenient speed proceed to the usual loading place, guaranteed for cargo in all this month," shows that the parties intended that the exception should not apply to this particular case. The first is a general question; the last is merely a question upon the construction of this charter-party. The first is, in effect, whether where a charter-party stipulates that the vessel shall proceed to a particular port for the purpose of receiving a cargo, and proceed thence to her port of destination, the exception of perils of the seas, &c., applies only to the voyage of the vessel with the cargo on board, or to the preliminary transit also. In order to determine that satisfactorily, we must see what is the meaning of the exception, "the act of God, &c., and all and every other dangers and accidents
*772] of the seas, rivers, and navigation during *the said voyage." But for that stipulation, the shipowner would be liable for the consequences of all dangers and accidents except those arising by the act of God. I presume it was for that reason the exception was introduced. It was intended to embrace every case of accident happening without any default on the part of the master and crew. That being so, it is clear that the reason for the exception applies as well to the preliminary voyage as to the voyage with the cargo on board. When one considers, therefore, the origin and the object of the exception, there can be no reason why it should be held to apply to one part of the transit rather than to the other. In truth, it comes to this,—was the preliminary transit a part of "the voyage?" I apprehend the voyage is nothing more than the passage of the vessel on the transit. The commencement of the voyage is the commencing to do that for which the shipowner is to be paid freight. Mr. *Lloyd* says the contrary has been already decided in two cases, viz. Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), and Valente *v.* Gibbs, 6 C. B. N. S. 270 (E. C. L. R. vol. 95). I apprehend, however, that, when the cases come to be looked at, it will be found that there is no decision upon the point except the case of Bruce *v.* Nicolopulo, 11 Exch. 129,† which is an authority against the present plaintiff. In Crow *v.* Falk, there was no preliminary transit. The vessel was at Liverpool: and it was for that reason the Court held that the exception did not apply while the vessel was at the port. As to Valente *v.* Gibbs, that was a very peculiar case. It was a claim for a penalty for a delay on the voyage. All that the Court decided, was, that delay *at* the port at which the vessel then was, was not a delay "on the voyage" within the meaning of the contract,—going no further than Crow *v.* Falk went. It is true that the Lord Chief Justice and Crowder, J., expressed
*773] an inclination to hold that *the voyage did not begin until the arrival of the vessel at the place where her cargo was to be taken on board: not, however, on the ground that the taking in of cargo was necessary to constitute a voyage, but on the peculiar language of the contract then under consideration. It was not at all a decision that there can be no voyage before the cargo is put on board. Then there is distinct authority in favour of the plea, in the case of Bruce *v.* Nicolopulo. It was there held that the preliminary voyage to the port of loading was to be considered part of the voyage within

the contract. That is a decision which is precisely in point, and, as it seems to me, in accordance with the good sense of the matter. It appears to me, therefore, that the owner has made a stipulation that he is not to be responsible for delay caused by a peril of the seas, rivers, or navigation whilst the vessel is proceeding to the place of loading, subject to the construction to be put upon the word "guaranteed." I am not aware that that word has any technical meaning, except in the case of a guarantee for the debt or default of another. As used in this charter-party, it means no more than a contract or engagement on the part of the owner that the vessel shall be ready at the loading place to receive her cargo within the stipulated time, unless prevented by an accident happening from a peril of the sea without any default on his part; and that, if the vessel is not so ready, the other party may treat it as a warranty, and throw up the charter-party. I entirely adopt the argument of Mr. *Rew*, that "guaranteed" is to be taken with the exception,—that it means guaranteed, subject to the defendant not being prevented by the excepted perils. I am therefore of opinion that the plea is good and an answer to the action.

BYLES, J.—I am of the same opinion. The question *is, what was meant by the words "the act of God, the Queen's [*774 enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever *during the said voyage* always excepted." Voyage means "passage by water from one port or place to another port or place."(*a*) That definition assists us but little in arriving at the true construction of this instrument. The plea informs us, that, at the time of the making of the charter-party, the said steamer, so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail and proceed: and it adds,—"and the said steamer, before reaching such usual place, would necessarily be exposed to divers dangers of seas, rivers, and navigation, all of which the plaintiffs and defendant at the time well knew." They must, therefore, be taken to have contemplated those facts at the time of making the charter-party. The shipowner engages that the ship shall with all convenient speed sail and proceed to a usual loading place. She was bound to proceed to that destination, to face that danger. Further, the charter-party provides that the ship, being tight, staunch, and strong, and every way fitted for the voyage, shall sail and proceed, &c. She is to be tight, staunch, and strong when she begins the former part of the transit. Looking at the place where the word "voyage" is first mentioned, it must necessarily include the previous portion of the transit, from the place where the vessel was at the time to the loading place. "Sail" is certainly a very strong expression. In insurance cases it is almost a technical word: it means "start on the voyage." Willes, J., in Valente *v.* Gibbs, says,—"When the *vessel sails, the voyage commences." I have no [*765 hesitation in saying that I think the plea good. I quite concur with my Brother Willes that a guarantee, like any other contract, may be either absolute or conditional.

MONTAGUE SMITH, J.—I am of the same opinion. It seems to me,

(*a*) See Webster's Dictionary and Johnson's Dictionary. See also the case of Gether *v.* Capper, 15 C. B. 696 (E. C. L. R. vol. 80).

that, under this charter-party, the voyage of the Smyrna commenced when she sailed from the place where she was at the time the charter-party was entered into. She was bound to make that voyage with all convenient speed. The place whence she started was the terminus à quo for the performance of the voyage mentioned in the charter-party. Then, does the exception apply to that voyage? The vessel is at a distance from the loading place, and she is to encounter perils and dangers of the seas, &c., in proceeding thither. Why should not the exception attach to the commencement as well as to the rest of the voyage? I think the fair meaning and intention of the parties was, that it should apply to the whole. As far as authority goes, the decisions seem to me to be in favour of the view we are now taking. In Crow *v.* Falk, 8 Q. B. 467 (E. C. L. R. vol. 55), this question did not arise. Lord Denman there says: "The words of the charter-party and declaration are perfectly clear. The end of the voyage is expressly marked out: the beginning is not: but the voyage could not begin before the ship's loading was completed. The exception is confined to the time during the voyage; and the breach takes place before it begins." In that particular case, the vessel never could sail until the goods were put on board. I do not think any argument is to be derived from the way in which policies of insurance are framed. They necessarily vary with the circumstances of each particular case. Construing this charter-party with the surrounding circumstances, I *776] can come to no other *conclusion than that the exception was intended to apply. I also agree with my Brother Willes as to the guarantee. I think the exception applies to that as well as to the rest of the charter-party. It was to cover perils which neither party could foresee. Judgment for the defendant.

RAWLINGS *v.* MORGAN. *May* 2.

The defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, at Christmas, 1863, the premises were dilapidated to an amount fixed by the jury at 22*l*. The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises:—Held, that the plaintiff was notwithstanding entitled to recover substantial damages.

THIS was an action brought to recover damages for breach of covenants in a lease, to repair and to yield up in repair a messuage and premises No. 24, Savage Gardens, in the city of London, together with certain fixtures therein.

At the trial before Willes, J., at the sittings in London after last Michaelmas Term, the following facts were agreed to by the respective counsel:—

The lease was for twenty-one years from the 25th of December, 1842, and expired on the 25th of December, 1863: the rent payable thereunder was 179*l*. per annum. At the making of this lease, the premises were about a century old.

The plaintiff is interested in one-fifth of the reversion; and the defendant became assignee of the term in 1847, and continued in posses-

sion of the premises up to the end of the term. The defendant gave up possession at the end of the lease.

For a considerable period before and at the expiration of the lease the premises were out of repair. The *amount required to put them into repair conformably with the covenant, was estimated at and was to be taken to be 130*l.* [*777

By letter dated the 1st of June, 1863, addressed to their solicitor, the defendant made an offer to the reversioners for a new lease. This letter was as follows:—

"15, London Street, Fenchurch Street,
"June 1st, 1863.
"24, Savage Gardens.

"Dear Sir,—We are instructed by our clients, Messrs. Morgan, Brothers, the tenants of the above premises, to make the following proposal to you, viz. They will be willing, on the expiration of their present tenancy, on the 25th of December next, to repair the premises pursuant to the covenant in the present lease, and to take a fresh lease of the premises as they now enjoy them, for twenty-one years from the 25th of December next, at a rental of 250*l.* per annum. The fresh lease to contain the same covenants as the existing one. But, if this proposal is entertained, it must be carried out at once, or our clients must be driven to seek other premises, in consequence of the nature of their business. "WRIGHT & BONNER."

This offer was not accepted.

Before the expiration of the lease, Messrs. Myers, the builders, of Lambeth, became the owners of one-fifth of the said reversion. Some time before the expiration of the lease, it was agreed between Messrs. Myers and the reversioners (the plaintiff being one of them) that the premises should be pulled down, and a new lease of the ground granted to Messrs. Myers, at a rent of 300*l.* a year from the 25th of December, 1863, and that they should lay out about 4000*l.* in the erection of new buildings upon it.

*Upon this the Messrs. Myers entered into possession on the 26th of December, 1863, and in January, 1864, commenced pulling down the old premises; and they were wholly demolished by the following June. [*778

The said agreement between Messrs. Myers and the reversioners was reduced into writing on the 21st of March, 1864, and a lease has since been prepared in compliance with it. The agreement was put in.

The condition in which the premises would be at the expiration of the lease formed no ingredient one way or the other in the Messrs. Myers's calculation, in making their aforesaid bargain.

It was admitted by the plaintiff that the amount paid into Court was sufficient to cover the plaintiff's share of the value of the fixtures mentioned in the declaration and nominal damages for the breach of the covenants to repair and yield up in repair: and it was admitted, that, if the plaintiff was entitled to more than nominal damages in respect of the covenant to repair, he was entitled to a verdict for 22*l.*: if not, the verdict was to be entered for the defendant.

Huddleston, Q. C., in Hilary Term last, obtained a rule nisi accordingly.

O'Malley, Q. C., and *Holl* now showed cause.—It is not found on

the notes that the plaintiff was not influenced in the bargain he made with Messrs. Myers & Son by the dilapidated state of the premises. Whatever might have been the equities of the Messrs. Myers, the plaintiff had the legal title to the premises at the time the cause of action accrued, and they were by reason of their dilapidated condition of less value to him than they would have been if the defendant had performed his contract, by the sum of 22*l.* If the plaintiff had on the 25th of December, 1863, a vested
*779] *right of action for substantial damages, no subsequent act of his in relation to the premises could entitle the defendant to say the damage should be nominal only. [BYLES, J.—Here, the contingency was reduced to a certainty before action brought.] Would it be any answer to a landlord's claim for non-repair, that the next tenant agreed to pay the same rent notwithstanding the dilapidations? There is no authority directly in point: but the principle seems clear enough. In Clow *v.* Brogden, 2 M. & G. 39 (E. C. L. R. vol. 40), 2 Scott N. R. 302, under circumstances very like these, the plaintiff was held entitled to substantial damages. Tindal, C. J., says: "I see no reason why the plaintiffs should not recover in this action the sum of 29*l.*, the amount agreed upon as the damages for the dilapidations caused by the breach of the covenant to repair entered into by the defendants. The answer set up, is, that the plaintiffs have sustained no actual damage, because (partly, at least, by the default of the defendants) the term in the premises has been determined. I think that it does not lie in the mouths of the defendants to make such an objection." In Smith *v.* Peat, 9 Exch. 161,† in an action by a lessee against an assignee for damage sustained by the former in consequence of the neglect of the latter, while he continued assignee, to repair the premises, pursuant to a covenant in the lease, it appeared that, in June, 1843, the plaintiff assigned the lease to the defendant; in October, 1851, the defendant assigned the lease to T.; and in June, 1852, T. assigned the lease to H., who in August, 1852, surrendered it to the ground-landlord: it was proved, that, in July, 1852, the premises were dilapidated, but there was no evidence of their state at any prior time: and it was held that the plaintiff was entitled to recover from the defendant substantial, and not merely nominal damages. "Where,"
*780] says *Parke, B., "there is a covenant to repair, the lessor has a right to have the premises in good repair; and, according to Lord Holt,—Vivian *v.* Champion, 2 Lord Raym. 1125, 1 Salk. 141,—the measure of damage is, the sum of money required to be expended in putting the premises in repair. That doctrine, however, has not been adopted in modern cases. In Doe d. The Trustees of the Schools, &c., of Worcester *v.* Rowlands, 9 C. & P. 734 (E. C. L. R. vol. 38), my Brother Coleridge ruled that the true measure of damage is, the amount to which the reversion is injured by the premises being out of repair." In Nixon *v.* Denham, 1 Irish Law Rep. 100, in covenant for suffering premises to be out of repair during the continuance of the term, it was held to be no objection to a verdict giving full damages for the injury which the property suffered, that the defendant was lessee in a lease for lives containing a covenant for perpetual renewal on the part of the lessor. The real question is, what is the amount of injury which the defendant's breach of covenant has

inflicted upon the reversioner. What other measure can there be than the value of the dilapidations? [BYLES, J.—It may be that competitors were kept out of the market by the condition of the premises.] Just so. In Davies *v.* Underwood, 2 Hurlst. & N. 570,† the defendant, an under-lessee, who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or other sooner determination of the term to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord brought ejectment, and evicted the plaintiff and defendant: and it was held that the plaintiff was entitled to recover against the defendant substantial damages for the non-repair of the premises.

**Huddleston*, Q. C., and *Beasley*, in support of the rule.—The defendant's term being about to expire, he writes to the plaintiff, offering to put the premises in repair, and take a renewed lease, at an increased rent. The plaintiff, having already made a bargain with Messrs. Myers & Son upon more advantageous terms, rejects the offer: and now, when the prostration of the premises has rendered the defendant's breach of contract unimportant to him, he sues for dilapidations. At the time the action was brought, the plaintiff was in no respect a sufferer from the breach of the defendant's covenant to repair. The object of damages in all these cases, is, to enforce the performance of the covenant. This is the view taken by Watson, B., in Davies *v.* Underwood, 2 Hurlst. & N. 570.† "The great object," he says, "of a covenant of this sort, is, not to put money into the pockets of a lessor, but to enforce the performance of the acts stipulated for." Where, as here, the lessor contemplates the destruction of the premises, he can have sustained no substantial injury from their non-repair. In Marriott *v.* Cotton, 2 Carr. & K. 553 (E. C. L. R. vol. 61), it was held, that, where a tenant for years agrees to keep the premises in repair during the tenancy, and before the expiration of the term, an action is brought against him for breach of this agreement, the plaintiff is entitled to recover nominal damages only.(*a*) The verdict therefore should be entered for the defendant, the damages really sustained having been sufficiently compensated by the 1*s.* paid into Court. [*781

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought by the plaintiff *as lessor, against the defendant, who had been tenant of premises under a lease, for the breach of a covenant to keep and to leave the demised premises in repair. It appeared that at the expiration of the lease the premises were out of repair, and that the sum which would be required to put them in repair in conformity with the covenant would be about 110*l.* The plaintiff was interested in one-fifth of the reversion. Ordinarily speaking, where there has been a breach of contract, the covenantee is entitled to recover such an amount of damages as would place him as nearly as possible in the same position as he would have been in if the covenant had been performed. That in this case is agreed to be 22*l.* Why, then, should not the defendant pay that sum? He [*782

(*a*) The propriety of this decision is questioned, and, it seems, justly, in Macnamara *v.* Vincent, 2 Irish Ch. R. 481, and Bell *v.* Hayden, 9 Irish Com. L. R. 301.

says he offered to take the premises of the plaintiff for a renewed term, but that the plaintiff declined to accept his offer. This the plaintiff had a perfect right to do. Then he says there was a very advantageous proposal on the part of Messrs. Myers under which the premises were to be pulled down, and therefore no damage could have resulted to the plaintiff from their dilapidated state. But, in the first place, it is to be observed that that merely lay in proposal: it was a mere oral agreement. And, if it had been a complete and absolute binding contract, that was not a matter that I should have directed the jury to take into their consideration in estimating the damages. I should not have excluded it; but it certainly is not a matter which it was obligatory on them to look at when measuring the loss the plaintiff had sustained by reason of the defendant's breach of covenant. That being so, the only question is whether the learned Judge was bound in point of law to direct the jury to find for the plaintiff with nominal damages only. My answer is, that he clearly was not. And it is agreed, that, if the plaintiff is entitled to more than nominal *783] *damages, he is entitled to the sum above mentioned. If before the cause of action accrued, and during the term, the plaintiff had entered into a binding agreement to assign the reversion to Messrs. Myers, that would have more material: and I do not say what I should have laid down for the guidance of the jury in that case. But that is not the case now before us.

BYLES, J.—I am of the same opinion. As I read the statement of facts, I conclude that the agreement made before the expiration of the defendant's term was not reduced into writing until after its expiration. That being so, and nothing having been done under the parol agreement at the time the cause of action accrued, and no obligation legal or equitable attaching to either of the parties to it, it seems to me that the plaintiff was entitled to sue the defendant for the full amount of the damage arising from the breach of his covenant to repair. It is true the plaintiff has since parted with the reversion: but he still may have sustained damage from the non-repair of the premises. It may be that they sold for a less sum in consequence of their dilapidated condition, or the plaintiff had a narrower market. If the plaintiff once had a vested right to recover substantial damages, I do not see how we can deprive him of that right. In all cases of this sort, the correct direction to the jury, as it seems to me, is, not that they ought to give only nominal damages, but that they are not *bound* to give more than nominal damages. Being unable to say that the jury might not give substantial damages, I think it is impossible for us to interfere.

KEATING, J.—I am of the same opinion. The defendant's term expired at Christmas, 1863. The agreement with Messrs. Myers was not put into a shape in which it was capable of being enforced until *784] the *month of March following. If an action had been brought against the defendant for a breach of covenant between those two periods, could it have been said that the plaintiff was not entitled to recover substantial damages? If not, what happened subsequently clearly could not deprive the plaintiff of that right. If even a binding agreement had been entered into with Messrs. Myers before the expiration of the term, I share in the doubt expressed by my Lord

whether that would have made any difference. It is not necessary to decide that upon the present occasion.

MONTAGUE SMITH, J.—I am of the same opinion. The premises being out of repair at the termination of the lease, the plaintiff had an undoubted right to maintain an action. The ordinary damages would be the amount which would be necessary to put them in a proper state of repair. The right to damages having accrued on the determination of the term, the lessor's intention to pull down the premises would not in the least affect his right to sue for full damages. But it is said that the agreement entered into with Messrs. Myers before the defendant's term came to an end shows that the plaintiff sustained no more than nominal damages by the defendant's breach of covenant. But it seems that there was no binding agreement at all with Messrs. Myers until three months after the expiration of the lease. The foundation, therefore, of that objection fails. If there *had* been a binding agreement, I doubt whether that would at all have interfered with the plaintiff's right. I cannot see how that should operate in law or good sense as an estoppel. It was a question for the jury: and I cannot see anything which ought to prevent the plaintiff from recovering such damages as would ordinarily be recoverable. Rule discharged.

---

*SCRIVENER and Another *v.* PASK. *April* 20. [*785

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities furnished by such architect to the builder.

THE first count of the declaration was for money payable by the defendant to the plaintiffs for goods sold and delivered, work and labour and materials, and money found due upon accounts stated.

The second count stated, that, before and at the time of the making of the promise by the defendant thereinafter mentioned, the defendant was about to cause to be erected a villa, and had caused to be made certain plans and specifications of the work to be done and of the materials to be provided for the erection of the said villa, and had invited the plaintiffs to make a tender for a contract with the defendant for the plaintiffs' erecting the same for reward to them in that behalf, and the defendant had caused to be taken out certain quantities as and for the quantities of the work to be done and of the materials to be provided for the erection of the said villa according to the said plans and specifications, and had furnished a bill of the said quantities to the plaintiffs, in order that they might make a tender to the defendant to contract with him for the doing of the work and providing the materials for the erection of the said villa, and for erecting the same at a price to be named by the plaintiffs by such tender; and that, in consideration that the plaintiffs would make such tender, the defendant guaranteed and promised the plaintiffs, that, if such tender should be accepted by the defendant, and a contract should be entered into by and between the plaintiffs and the defendant for the doing of the said work and providing the said materials, and for the erection

of the said villa by the plaintiffs, the said quantities represented
*786] and would represent the true *and correct quantities of the work to be done and of the materials to be provided for the erection of the said villa according to such plans and specifications: Averment, that the plaintiffs, confiding in the defendant's said guarantee and promise, made an estimate of, and delivered to the defendant a tender for, the plaintiffs' doing the said work and providing the said materials, and for the erection by them of the said villa, at and for a certain price named therein, and the same was founded on the said bill of the said quantities so delivered to them by the defendant; and their said tender was accepted by the said defendant, and a contract was entered into by and between the plaintiffs and the defendant, for the erection of the said villa by the plaintiffs for the defendant according to the said plans and specifications, for a certain price; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiffs to have a performance by the defendant of his said guarantee and promise, and to maintain this action for the breach thereof by the defendant as thereinafter alleged: Yet the said bill of the said quantities delivered by the defendant to the plaintiffs did not represent the true and correct quantities of the work to be done, and of the materials to be provided for the erection of the said villa according to the said plans and specifications; whereby the plaintiffs' said estimate and tender, and the said contract, were made and entered into by the plaintiffs for a lower price for the plaintiffs' erecting the said villa than they would otherwise have been, and the plaintiffs had sustained much loss and damage, and had incurred further great expense in providing under the said contract work and materials required for the erection of the said villa according to the said plans and specifications, which were not set out or
*787] stated in the said bill of the said quantities *of work and materials so delivered by the defendant to the plaintiffs, and the plaintiffs had been and were by means of the premises otherwise injured: Claim, 500*l.*

To the first count, except as to 210*l.* 7*s.*, the defendant pleaded,—first, never indebted,—secondly, payment before action,—and thirdly, as to the 210*l.* 7*s.*, payment into Court. He also pleaded to the special count,—fourthly, that he did not guaranty and promise as alleged,—fifthly, that he had not caused to be taken out certain quantities as and for the quantities of the work to be done and of the materials to be provided for the erection of the said villa, and had not furnished a bill of the said quantities to the plaintiffs,—sixthly, a denial of the breach and every part thereof. Issue.

The cause was tried before Byles, J., at the sittings in Middlesex after last Hilary Term. The facts were as follows:—The defendant, being desirous of erecting a villa residence in the neighbourhood of Twickenham, employed one Paice, an architect, to prepare the necessary plans and specification, and to procure a builder to do the work. The plans and specification were accordingly prepared by Paice, who put himself in communication with the plaintiffs, who are considerable builders carrying on business in Fitzroy Road, Regent's Park; and in the result the following agreement was entered into between the parties on the 15th of April, 1864:—

"Whereas, in consideration of the sum of 440*l.*, the said W. Scrivener and R. White, or their heirs, executors, administrators, or assigns, agree and covenant on his or their part to execute the necessary works in erecting and completing a dwelling-house and certain fencing on plot 52 on the St. Margaret's estate, Twickenham, in the county of Middlesex, according to *drawings, specification, and conditions of contract, and under and to the satisfaction [*788 of the said William Paice. The said James Pask, or his executors, administrators, heirs, or assigns, agree and covenant on his or their part to pay unto the said W. Scrivener and R. White the above mentioned sum of 440*l.* according to the terms set forth in the said conditions of contract. And, lastly, the said William Paice on his part agrees to inspect and superintend the works while in progress; also to furnish detail drawings, certify the payment of advances, and to the actual completion of the works according to the conditions of contract."

The conditions of contract were in substance as follows:—

"The contractor is to find all the materials, labour, scaffolding, tackle, carriage, water, and everything necessary for the proper performance and due execution and completion of the works described in the specification and the plans therein referred to, and whatever is expressed, set forth, or implied therein. The whole of the works are to be done with the best materials, and in the most workman-like manner, to the entire satisfaction of Mr. William Paice, the architect. * * * The contractor is to perform all the works specified herein, and to complete the same to the satisfaction of the architect: and, should anything be omitted to be specified therein which by the nature of the works, or in the opinion of the architect, should clearly have been intended to be performed in order to the full completion of the same, the contractor is to perform the same, and no allowance whatever is to be made for so doing:

"The architect shall be at liberty to increase or diminish the dimensions, or alter the situations, or vary the form or dimensions of any part of the work, without in any way vitiating the contract: and the *contractor shall, in pursuance of such direction as he may [*789 receive in writing, from the architect, but not otherwise, execute the works thereby ordered, and the difference of expense occasioned by any such increase or diminution shall be paid for at the rate of 10 per cent. under Laxton's price-book for the present year: and, in case of dispute, the cost shall be ascertained by the architect, and shall be added or deducted from the amount of the contract, as the case may be: but no allowance will be made for works executed without previous order given in writing under the hand of the architect:

"It is to be clearly understood that no extra charges whatever will be allowed the contractor without written instructions and authority for the same from the architect; and also it is to be clearly understood, that, should any extra works beyond that set forth or intended in the specification be ordered, the cost of the same will be ascertained by admeasurement, and charged for at the rate of 10 per cent. less than Laxton's price-book for the current year:

"No extra works will on any account make void this contract. *f*

extension of time beyond the stipulated period of three months will be allowed the contractor for works extra, after the rate of one day for every 3*l.* worth of additional work. The contractor shall maintain in complete repair the whole of the above works for a period of six months after the date of the architect's certificate of the completion of the same; but the proprietor shall notwithstanding be at liberty to use the said works during the said six months:

"The contractor to finish the whole works within twelve weeks from the date of the architect's order to commence the same, and to pay 1*l.* as liquidated damages for each and every day that any part of the said works shall remain unfinished after that time:

*790] *"It is to be clearly understood that the architect's opinion and judgment and decisions are to be in all cases considered final and binding.

"Payment to be made on the architect's certificate, as follows, namely, first payment of 60*l.* as soon as the first-floor joists are laid and the whole of the flooring on the premises; second payment of 80*l.* as soon as the whole building is properly carcased in; third payment of 100*l.* as soon as the work is completed, except painting, paper-hanging, and fencing; the balance of contract to be paid within a week of completion."

The specification minutely described the builder's, slater's, mason's, carpenter's and joiner's, smith's, plumber's, glazier's, painter's, and paper-hanger's works.

Before the contract was signed by the plaintiffs, a bill of quantities, which had been procured by Paice, was sent to them, and they were assured by Paice that those quantities were correct. But, by the time the building had reached the first floor, they discovered that the quantity of materials required had been much under-estimated: and, when they communicated the fact to Paice, he admitted it, and assured the plaintiffs that it should be "made right." When the house was completed, it was found that the quantity of materials necessarily used very considerably exceeded those mentioned in the bill of quantities, and in respect of these the plaintiffs claimed 155*l.* 1*s.* 7*d.*

One of the plaintiffs, on cross-examination, admitted that, if shown a drawing for a building, with the dimensions properly marked thereon, he could with an expenditure of some time and trouble ascertain by calculation the quantity of bricks and other materials which would be required, and that the plans referred to in the contract distinctly showed the dimensions of the house and the size of the rooms; and the other admitted that the defendant had told him while the

*791] *building was going on that it was an object to him not to exceed the contract-price, and that no communication as to the incorrectness of the bill of quantities was ever made to the defendant until after the house was finished.

Mr. Lansdowne, a surveyor of experience, who was called as a witness on the part of the plaintiffs, stated that a builder cannot tender without a bill of quantities, and that the bill of quantities is usually prepared by a surveyor. On cross-examination, he stated that the builder sometimes took out the quantities for himself, and sometimes employed a surveyor, but that a careful builder would not rely upon the bill of quantities prepared by the architect. And, in answer to a

question put to him by the learned Judge, he said, that, with the drawings and specifications before him, the builder or somebody whom he employed could get out the exact quantities with a little trouble; and that the builder whose tender is accepted invariably pays the surveyor for taking out the quantities, by whomsoever he is employed, and he adds the charge to his tender.

In the present case the bill of quantities was prepared by one Oliver, a surveyor with whom Paice the architect was a partner, and the plaintiffs paid the surveyor's charge, and added 2 per cent. to the amount of their estimate in consequence.

On the part of the defendant it was submitted by *Chambers*, Q. C. (with whom was *Clare*), that the defendant was not responsible for the inaccurate representation of the architect, and that the plaintiffs were themselves bound to see that the statement of quantities was correct before they made a tender. He referred to a case of Sherren *v.* Harrison, coram Blackburn, J., at the sittings at Westminster after Hilary Term, 1860, reported only in a periodical called "The *Builder" of the 11th of February, 1860, but for the substantial accuracy [*792 of which he (having been counsel for the plaintiff) vouched. The action was brought to recover a balance for "extra work" beyond what was contained in a certain contract and specification. It appeared that the defendant, who was desirous of building a church, employed an architect named Mumford to prepare the necessary plans and specification, and that the plaintiff, upon the faith of an estimate of the quantities furnished to him by Mumford, entered into a contract to erect the church for 1998*l.* The quantities turned out to be so inaccurate that the expense of the building exceeded 3600*l.* By the terms of the contract, no extras were to be allowed without the certificate of the architect. Upon this state of facts it was contended for the plaintiff that the conduct of the architect amounted to a species of fraud, and that, as the architect was the agent of the defendant, the latter was responsible for his representations in reference to the contract. The learned Judge, however, ruled otherwise, and the plaintiff was nonsuited. The plaintiff afterwards moved for a new trial, on the ground of misdirection; but the rule was refused,—see 25 Law Times 79.

For the plaintiff it was insisted by *Denman*, Q. C. on the authority of Moon *v.* The Guardians of the Witney Union, 5 Scott 1, 3 N. C. 814 (E. C. L. R. vol. 32), that the architect, in preparing the bill of quantities, was acting as the agent of the defendant, and consequently that the defendant was bound by representations made by him in reference to the contract. He also referred to Bristow *v.* Whitmore, 9 House of Lords Cases 391.

The learned Judge intimated that the architect seemed to have been employed and paid by the plaintiffs to take out the quantities, and that, if so, the defendant was not responsible for his blunder: and *ultimately he nonsuited the plaintiff, on the ground that there [*793 was no evidence to show that Paice was the defendant's agent to make the representation he did as to the correctness of the quantities, or that the defendant guarantied and promised the plaintiffs that they were accurate. He however reserved leave to the plaintiffs to move to enter a verdict for them for such sum as an arbitrator might

fix, if the Court should be of opinion that there was evidence which ought to have been left to the jury,—the Court to be at liberty to draw any inferences of the fact which the jury might have drawn.

Denman, Q. C., pursuant to the leave so reserved to him, now moved accordingly.—He submitted that the architect was the agent of the defendant, that it was the architect's duty to prepare the quantities, and that the defendant was bound by representations made by him in the performance of that duty; and for this he relied upon Moon *v.* The Guardians of the Witney Union, 5 Scott 1, 3 N. C. 814 (E. C. L. R. vol. 32). There, K., an architect retained by the defendants to prepare plans and a specification for the erection of a workhouse for a union of which the defendants were guardians, employed the plaintiff, a surveyor, to make out the bill of quantities. An advertisement for tenders was prepared, referring the builders desirous of tendering to the office of the defendants' clerk for a view of the plans and specification. The instructions given to the defendants' clerk to show to the builders, contained an intimation that the quantities were being taken out, and that the expense of taking them out was to be defrayed by the successful competitor. It was proved to be the custom for the architect to employ a surveyor to make out the bill of quantities, and for the successful competitor to pay his charge.

*794] A misunderstanding *having arisen between the defendants and K., another architect was employed, and when K. sent in his bill claiming 113*l.* for the plans and specification, and 65*l.* as "the surveyor's charge for making out the quantities," the defendants paid him 80*l.*, which he received in satisfaction of *his* demand, nothing being said about the surveyor's charge. This Court held, that under the custom proved, the architect K. must be considered the defendants' agent in the employment of the surveyor, and consequently the latter was entitled to sue the defendants for the value of his services,—the want of a successful competitor being occasioned by their act. [ERLE, C. J.—I should have thought it was the builder's duty to see to the accuracy of the quantities before he tenders. If he choose to trust to the accuracy of the information given to him by the architect, well and good.] In all cases where a man accredits another as his agent, he gives him authority to do all that is fairly necessary to the performance of his duty as agent. In Udell *v.* Atherton, 7 Hurlst. & N. 172,†—where all the authorities, including Cornfoot *v.* Fowke, 6 M. & W. 373,† were considered,—Pollock, C. B., and Wilde, B., held that a principal is liable, in an action of deceit, for the false and fraudulent representations of his agent as to the quality and value of an article, whereby a person has been induced to purchase it for more than its worth, notwithstanding that the principal neither authorized nor knew of the fraudulent conduct of his agent. Wilde, B., in delivering his opinion in that case, refers to and adopts what is said by Mr. Justice Story in his Principal and Agent, §§ 134, 135,—"Where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the res

*795] gestæ." "If the agent at the time of *the contract makes any representation, declaration, or admission touching the matter of the contract, it is treated as the representation, declaration, or

admission of the principal himself." The learned Baron goes on to say,—p. 184,—"Whatever his previous authority to the agent, whatever his own innocence, he (the principal) must adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether." In Routh *v.* Macmillan, 2 Hurlst. & Colt. 750,† the defendants, shipowners at Liverpool, by power of attorney appointed one Periam their agent, inter alia, to charter their ship Hannah Easter, or employ her as a general ship, on such terms or in such manner as he should think proper, and generally to represent them in relation to the premises, and to the said brig, her management or sale, as fully as if they were personally present. The Hannah Easter had been an A 1 ship at Lloyd's, but had run off her letter before the power was executed, and was not described as A 1 in the power. The plaintiffs, British subjects and merchants at New York, having an order from England for a cargo of wheat, chartered the Hannah Easter to carry it from New York to Gloucester. The charter-party, which was not under seal, purported to be made between the plaintiffs and Periam, "agent for owners of the A 1 Br. brig Hannah Easter, of Liverpool." The consignee of the cargo, on learning that the ship was not A 1 at Lloyd's, refused to accept. Ultimately, however, he agreed to accept, upon the plaintiffs' agent in England undertaking to pay the extra expense of insurance in consequence of the ship not being A 1. The cargo arrived safe. In an action for breach of warranty of the ship's class, the plaintiffs sought to recover the extra expense of insurance which they had repaid their agent: and it was held that the power of *attorney authorized [*796
the warranty. Stucley *v.* Baily, 31 Law J., Exch. 483, 1 Hurlst. & Colt. 405,† is an authority to the same effect. In Bristow *v.* Whitmore, 9 House of Lords Cases 391, 418, Lord Kingsdown says: "If an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot at once approbate and reprobate it. He must adopt altogether or not at all: he cannot at the same time take the benefits which it confers, and repudiate the obligations which it imposes." That doctrine precisely applies here.

ERLE, C. J.—I think there should be no rule in this case. It appears that the defendant wanted a house built, and accordingly employed an architect to prepare the necessary plans and specification, and to get a builder to undertake the work. The plans and specification were laid before the plaintiffs, builders, and they undertook the work at a given price. In the course of the construction of the house, the plaintiffs found that the quantity of materials required for the purpose was very considerably more than they had expected; and they now call upon the defendant to pay for the excess. It appears, that, before the work was undertaken, the plaintiffs had a conversation with the architect, who informed them that he had got the quantities made out, and that they were so and so: and it turned out that the information so given was inaccurate. The question is, whether the defendant is responsible for the representation so made by the architect to the builders, which the latter were at liberty to adopt or to reject at their pleasure. Having acted upon the representation, and finding it mistaken, they now turn round upon the defendant and insist that the architect was employed by him, and therefore

*797] he is responsible for the architect's acts. I cannot, however, *discover any evidence that the defendant employed the architect to tell the builders that the quantities of materials required to complete the structure would be so much and no more. Indeed, there was evidence from the mouth of one of the plaintiffs' own witnesses, that a careful builder always calculates the quantities for himself before he makes a tender.

BYLES, J., concurred.

KEATING, J.—I also think the nonsuit right, upon the ground stated by my Lord. The case mainly relied on by Mr. *Denman*, that of Moon *v.* The Guardians of the Witney Union, is quite distinguishable from the present. That was an action by the surveyor who had taken out the quantities, against the guardians who had employed the architect, amongst other things, to cause that work to be done. The advertisement for tenders referred builders desirous of tendering to the office of the clerk to the guardians for the purpose of seeing the plans and specification; and the instructions given to the defendants' clerk to show to builders applying contained an intimation that the quantities were being taken out, and that the expense of taking them out was to be defrayed by the successful competitor. And, when the architect sent in his bill to the guardians containing the surveyor's charge for taking out the quantities, no objection was made to that item, but they paid him a sum, which he received in satisfaction of his charge, nothing being said about the surveyor's charge. That was much relied on: and the Court held that there was evidence to go to the jury in support of the plaintiff's claim. That clearly is no authority for the contention here, that the customer is responsible for

*798] a representation made by the architect *to the builder as to a matter of which the employer must necessarily be entirely ignorant. Rule refused.

(a) See Addison on Contracts, 4th edit. 633, where the law seems to be laid down with remarkable precision,—"It is not every affirmation and representation which will be binding upon the principal. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, or even if its correctness or incorrectness may be ascertained by the party interested in knowing the truth, by the exercise of ordinary inquiry and diligence, and the agent making the statement merely says what he believes to be true, and expresses his opinion in an ordinary conversation about the matter, leaving the party dealing with him to test the accuracy of his statement by more extended inquiries (he having the means of so doing within his reach), there is no warranty on the part of the agent of the truth of what he states: it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party."

PIGRIM *v.* SIR NORTON KNATCHBULL, Bart. *April* 25.

A writ of summons issued against the defendant on the 5th of January, 1865. The *defendant* had two residences, one in London, the other in Kent, more than twenty miles distant from the plaintiff's residence, which was in London. On the 4th of January, the plaintiff's attorney received a letter from the defendant, *dated from his residence in Kent*, referring him to his attorneys in London to accept service of process for him. The defendant's attorneys on the day of the issuing of the writ gave an undertaking to appear: and *on that day one of them had an interview with the defendant at his London residence*:—

Held,—on the authority of Butler v. Ablewhite, 6 C. B. N. S. 740,—that the result of the facts thus appearing was, that the defendant was residing in Kent at the time of the commencement of the action, and consequently that there was concurrent jurisdiction, and the plaintiff was entitled to his costs, under the 15 & 16 Vict. c. 54, s. 4.

THIS was an action brought by the plaintiff to recover from the defendant the sum of 15*l.* 3*s.* 3*d.*, alleged to be due to him for wages as butler. The defendant *had paid 5*l.* into Court; and at the [*799 trial before the sheriff of Middlesex, a verdict was found for the plaintiff for 10*l.* 3*s.* 3*d.* beyond the sum so paid in. An application was made to the undersheriff at the trial for a certificate that the cause was proper to be tried in the Superior Court, but was refused.

Upon an affidavit of the plaintiff stating that, "at the time of the commencement of the action, the plaintiff dwelt at No. 11, Wilton Terrace, Wilton Road, Pimlico, in the county of Middlesex, and the defendant at the time of the commencement of the action dwelt at Mersham Hatch, near Ashford, Kent, and that their respective dwellings were then and still are more than twenty miles apart from each other, and also an affidavit of his attorney stating, that, on the 4th of January, he received a letter from the defendant, dated Mersham Hatch, January 3d, 1865, stating that he would instruct his attorneys in London to accept service of process for him, and that the writ of summons issued on the 5th, and an undertaking was on that day given to appear."

B. T. Williams moved for an order under the 15 & 16 Vict. c. 54, s. 4, that the plaintiff should have his costs of the action. The affidavits in opposition to the rule state that the defendant dwells at No. 3, Chesham Place, Belgrave Square, London (which is less than twenty miles from the plaintiff's residence), as well as at Mersham Hatch, Ashford, Kent; that he keeps an establishment at No. 3, Chesham Place, and is frequently there during the year, and for long periods at a time; that the plaintiff's hiring as a butler was made by Lady Knatchbull at No. 3, Chesham Place; that the writ in this action was issued on the 5th of January, 1865; and that the defendant was then at his residence No. 3, Chesham Place. Where **the plaintiff* has two permanent places of residence at the time of [*800 the commencement of the action, either of which is distant more than twenty miles from the defendant's dwelling, it is a case of concurrent jurisdiction within the 128th section of the County Court Act, 9 & 10 Vict. c. 95, and he is entitled to costs under the 15 & 16 Vict. c. 54, s. 4. This Court so decided, after time taken to consider, in Butler *v.* Ablewhite, 6 C. B. N. S. 740 (E. C. L. R. vol. 95), and the Court of Queen's Bench adopted that decision in Kerr *v.* Haines, 29 Law J., Q. B. 70. [BYLES, J.—In the latter case, the Court held that the plaintiff dwelt at Margate, and not in London.] In giving judgment in Butler *v.* Ablewhite, Cockburn, C. J., refers to an earlier case of Macdougall *v.* Paterson, 11 C. B. 755, where the question was brought under the consideration of this Court. "It became, indeed," says his Lordship, "unnecessary to decide it; but the inclination of the opinion of the Court would appear to have been in favour of the concurrent jurisdiction. Jervis, C. J., in delivering the judgment of the Court, says, 'The defendant contended, that, at the time of the

action brought, the plaintiff dwelt in two places,—in Scotland, and in Golden Square; and, *perhaps, even if this had been the case*, this Court would have had concurrent jurisdiction, because it could not in that case have been suggested on the roll that the plaintiff did not dwell more than twenty miles from the defendant.' And in the course of the argument, Mr. Justice Maule made this observation. 'Assuming that a man may have a dwelling-house in two places at the same time, he may, as I read the Act, have the rights which belong to a man who dwells more than twenty miles off, and also those which belong to a man who dwells less than twenty miles off. There are no negative words in the Act.' The impression of that learned Judge, there-
*801] fore, seems *to have been, that, if the plaintiff has two permanent residences, one more and one less than twenty miles off, whether he be actually occupying the one or the other at the time of action brought, there is concurrent jurisdiction."

Marshall Griffiths showed cause.—Bailey *v.* Bryant, 1 Ellis & Ellis 340, is directly in favour of the defendant, and is not to be distinguished from Butler *v.* Ablewhite. There, an action having been brought in the Queen's Bench, by two joint plaintiffs, upon a cause arising within the jurisdiction of the London (City) Small Debts Extension Act, 15 & 16 Vict. c. lxxvii.,(*a*) on contract, and a verdict of less than 50*l.* having been found, the defendant applied to deprive the plaintiffs of costs, on affidavit that the defendant carried on business in the city of London at the times of the cause of action arising and of the commencement of the action; that the plaintiffs carried on business at Southwark, within twenty miles of the residence and place of business of the defendant, and did not, as the deponent believed, at the time of action brought, dwell more than twenty miles from the defendant. No place of residence or business was more particularly described. It was held that this affidavit was sufficiently precise to
*802] call for an answer. In answer it *was deposed that one of the plaintiffs had three residences, two more than twenty miles distant from the defendant's place of business, and that the deponent did not know of the defendant's residence unless it was such place of business; that the same plaintiff had also a dwelling-house in Westminster, within such twenty miles, which he occupied for three or four months only in the year, for the purpose of attending in Parliament, of which he was a member; and that he was resident in one of the two residences first mentioned at the time when the action was brought. It was held that this did not answer the defendant's affidavit, within the meaning of s. 118. "It is clear," said Lord Campbell, C. J., "that the plaintiff Bailey has a permanent residence at Westminster: his house there is not a mere lodging: it belongs to him all the year round, though he does not use it so much as his other residences." In Kerr *v.* Haines, an attempt was made to distinguish that case from Butler *v.* Ablewhite: but Cockburn, C. J.,

(*a*) By the 118th section of which it is enacted that all actions which before the Act might have been brought in the superior Courts, where the plaintiff dwells more than twenty miles from the defendant, may be brought in the superior Court, at the election of the party suing (with some exceptions). And by s. 119, that, in other cases for which a plaint might have been entered under the Act, the plaintiff is to have no costs if the verdict be not for more than 50*l.*, if the action be founded on contract, unless the Judge certify that the action was fit to be brought in the superior Court.

said it was impossible to distinguish them. [MONTAGUE SMITH, J.—To which of those two cases did the Court adhere in Kerr *v.* Haines?] It was not necessary to decide; for, they held that the *residence* was in Margate only. There is this distinction between Butler *v.* Ablewhite and the present case,—There, at the time the action commenced, the plaintiff was actually residing in Warwickshire; whereas here the defendant was residing at that time at No. 3, Chesham Place. Besides, all the cases were cases where the party who had the two residences was the plaintiff: here it is the defendant. [ERLE, C. J.—What difference can that make? BYLES, J.—In either case,—or if both plaintiff and defendant have two dwellings—the plaintiff does in one sense dwell more than twenty miles from the defendant.(*a*)] The words of the Act are *enabling and not negative words: and it would manifestly be contrary to the policy of the Act to allow [*803 a plaintiff to resort to the superior Court in a case like this. In Macdougall *v.* Paterson, the decision was that the party had not two residences. Can it be said here that the plaintiff does not, within the words of the 128th section, dwell within twenty miles of the defendant? So to hold will be to deprive the defendant of a right which the statute has given him, because he happens to possess a country-house.

Williams, in support of the rule.—Butler *v.* Ablewhite is conclusive. The only distinction suggested between that case and the present, is, that there it was the plaintiff who had two residences, and the defendant here. [BYLES, J.—The Court there lay some stress upon the fact that the plaintiff was actually residing with his family at his residence in Warwickshire at the time of the commencement of the action.] The affidavits in opposition to the motion do not show that the defendant was dwelling at his London residence on the 5th of January, when the writ issued, but merely that he was seen there on that day. On the 3d, he wrote from his residence in Kent referring to his solicitors for an undertaking to appear. [ERLE, C. J.—The jurisdiction of the County Court rests upon the dwelling of the defendant: 9 & 10 Vict. c. 95, s. 60. If the *plaintiff has a dwelling more than twenty miles from the dwelling of the [*804 defendant, the authorities hold that the plaintiff may set up his more distant dwelling to sustain his right to sue in the superior Court. The place of the defendant's dwelling must all along be assumed to be the matter to which the legislation relates. I am unable to make out a satisfactory distinction between the plaintiff's dwelling and that of the defendant.]

ERLE, C. J.—I am always desirous of adhering to any rule I find laid down: and I agree with that laid down by this Court in Butler *v.* Ablewhite, 6 C. B. N. S. 740 (E. C. L. R. vol. 95). There, the plaintiff had two residences, one of which was within twenty miles of the defendant's residence, the other beyond that distance: and the Court

(*a*) Gorslett *v.* Harris, 29 Law Times 75, was the case of a defendant. There, upon an application to deprive the plaintiff of costs, it appeared that the defendant was a builder who had been employed to fit up certain houses in the County Court district where a material part of the cause of action arose, and that, for the purpose of performing that contract, he had set up workshops and counting-houses there: and Lord Campbell said: "All this is only for the purpose of performing this particular contract, and is only to last whilst the job continues. That being so, he does not carry on his business there, within the meaning of the County Court Act."

put their judgment upon the ground that the plaintiff's actual residence at the time the action was commenced was at the more distant place. I feel no hesitation in adhering to that case as it stands. The point there decided, however, is not precisely the point which is raised here; for, here the question arises in respect of the *defendant* having two residences. I am unable to find that this circumstance creates any real distinction between the two cases. I give my judgment according to the decision in Butler *v.* Ablewhite, because the fair result of the affidavits on both sides seems to me to be, that, although he was on that day seen at his London house, the actual place of residence of the defendant at the time the writ of summons was issued was Mersham Hatch, in the county of Kent, which is more than twenty miles distant from the plaintiff's residence, and therefore the plaintiff had a right to resort to the superior Court for the recovery of his demand. I therefore think the rule should be made absolute for the allowance of the plaintiff's *costs. As, however, cause is shown in the first instance, the costs of the rule are in our discretion: and I think, under the circumstances, the plaintiff should not have those costs.

*805]

BYLES, J.—I am of the same opionion. The case of Butler *v.* Ablewhite underwent much consideration. The decision there proceeded, and in my judgment correctly, upon a literal construction of the statute 9 & 10 Vict. c. 95, s. 128. By the Statute of Gloucester, 6 Ed. 1, c. 1, a plaintiff who obtains a verdict is entitled to costs, unless he is deprived of them by some subsequent legislative enactment. The plaintiff contends that the statute 9 & 10 Vict. c. 95, does not deprive him of his right to costs, because he brings himself within the concurrent jurisdiction clause, his residence being distant more than twenty miles from the residence of the defendant at the time of the commencement of the action. If that fact had been suggested upon the roll here, and issue taken upon it, it must have been found for the plaintiff. It seems to me that there is no real distinction in this respect between a plaintiff having two residences, one within and the other beyond the prescribed distance from the defendant's residence, and a defendant having two residences similarly circumstanced as to distance from the plaintiff's place of abode. I therefore think our decision is governed by the authority of one, if not by that of two cases in this Court,—Macdougall *v.* Paterson, 11 C. B. 755 (E. C. L. R. vol. 73), and Butler *v.* Ablewhite, 6 C. B. N. S. 740 (E. C. L. R. vol. 95).

MONTAGUE SMITH, J.—I am entirely of the same opinion.

Rule absolute, without costs.

*PRESTWICH and Another *v.* POLEY. *May* 9. [*806

1. An attorney has a general authority to compromise an action on behalf of his client,—provided he act bonâ fide and reasonably, and not in defiance of the direct and positive instructions of the client.

2. And this authority, it seems, extends to a managing clerk having the general conduct of the business.

3. The plaintiffs employed A., an attorney, to sue B. for the price of a piano-forte sold and delivered. The cause having proceeded as far as the joinder of issue, A. finding B. unable to pay, agreed with him (by his managing clerk), that the plaintiffs should take back the piano-forte, and that the costs should be paid by certain instalments. The plaintiffs on being informed of this arrangement, repudiated it, and A. gave notice of trial:—Held, upon a motion to stay the proceedings on the ground that the action was settled, that this compromise was within the general scope of the attorney's authority, and binding as between the plaintiffs and B.

4. Whether it would have been competent to the attorney to accept *any other goods* in satisfaction of his client's claim,—*quære?*

THIS was an action brought to recover the sum of 38*l.*, the price of a piano-forte sold and delivered by the plaintiffs to the defendant.

The cause being at issue, and notice of trial having been given, the defendant's attorney called at the office of the plaintiff's attorney, and proposed to settle the action by returning the piano-forte and paying an agreed sum for costs; and ultimately the following terms were settled and reduced into writing, and signed by Swann, *the managing clerk of the plaintiffs' attorney*, and by the defendant's attorneys:—

"London 6th April, 1865.

"Prestwich and Another *v.* Poley.

"This matter has been settled upon the following terms,—Piano to be given up in full discharge of the debt in this action, and costs, agreed at 9*l.*, to be paid by the following instalments, 5*l.* to-morrow, and balance in a month from that date.

"THOMAS ANGELL, plaintiff's attorney.

"PIKE & SON, defendant's attorneys."

An appointment was afterwards made for the plaintiffs to attend at the defendant's house on the following day to take away the piano forte, and the defendant's attorneys sent Mr. Angell a check for 5*l.* on account of the costs. On the following day, April 7th, the plaintiff's attorney, by his managing clerk, Swann, wrote to the defendant's attorneys,—"My clients do not seem inclined to accept the terms proposed by *you;" and on the 8th the check was returned, and notice of trial given. [*807

On the 24th of April, application was made to Keating, J., at Chambers, for an order to stay the proceedings in the action, on the ground that the matter had been settled. The learned Judge thought the agreement ought to bind the parties; but, pressed by the case of Swinfen *v.* Swinfen, he declined to make the order, but without prejudice to an application to the Court.

Needham, accordingly, on a former day in this term, obtained a rule nisi to the same effect. The affidavit upon which the motion was founded, after setting out the above facts, proceeded to allege that "Swann is the managing clerk of the said Thomas Angell, and is a thoroughly competent and shrewd man," and further that he was in the habit of transacting business for him as if he were principal.

Prentice now showed cause, upon a joint affidavit by Angell and

Swann, the latter of whom deposed, that, upon Angell opening the letter enclosing the 5*l.* check, he informed him (Swann) that he had done wrong in giving the above memorandum to the defendant's attorneys, as the plaintiffs had declined to accept the return of the piano-forte, as proposed; and the former deposed that he had not at the time mentioned, nor had he at any time had, the authority of the plaintiffs to settle the action upon the terms stated, or upon any other terms than the payment of the debt and costs in the action. The attorney was employed to take proceedings in the ordinary way to recover the price of the piano-forte, not to make an arrangement for its return. That an attorney has no right to compromise a suit, was decided by
*808] the Master of the Rolls *in Swinfen *v.* Swinfen, 27 Law J., Ch. 35,—the client not having been aware of it, not having sanctioned it, and refusing to be bound by it: and that decision was affirmed by the Lords Justices,—see 2 De Gex & Jones, 381, 27 Law J., Ch. 491. "Between principal and agent," says the Master of the Rolls, 27 Law J., Ch. 40, "the agent has full authority to do everything within the implied scope of his authority. If an attorney is employed to conduct a suit for a client, a compromise does not in terms come within the scope of his authority: it is not within the management of the cause. Upon what principle, therefore, can it be said that there is an implied authority for an attorney to compromise the suit which he is employed to conduct? Suppose an attorney is employed to recover an estate, does the authority extend to selling that to a stranger? Yet a compromise is nothing more than a sale from the plaintiff to the defendant upon certain terms. I should as little expect an attorney to have such an authority as I should expect a person employed to take horses to a particular place to feed and to break them in, to have an implied authority to sell or exchange them. A coachman drives my carriage, and I am liable for all the acts which he does whilst driving the carriage; but he has no authority to sell or exchange the carriage. Unless there is some different rule applicable to attorneys, it is impossible to say that an attorney has an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which he is employed to do." He then goes through the authorities, and comes to the conclusion that the compromise in that case was void. [MONTAGUE SMITH, J.—Might the attorney here have compromised by taking 5*s.* in the pound for the debt?] Clearly not. [KEATING, J.—Could he have consented to refer the matter to an arbitrator, who might award
*809] *that to be done?] The attorney as well as the counsel probably has authority to refer, but not in an unusual manner. Pollock, C. B., in delivering the judgment of the Exchequer Chamber in Swinfen *v.* Lord Chelmsford, 5 Hurlst. & N. 890, 922,† says: "We are of opinion, that, although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it,—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion he thinks ought to be called, and other matters which properly belong to the suit, and the management and conduct of the trial,—he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the

owners of adjoining land,—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale, and bind the parties to the suit without their consent, and certainly not contrary to their instructions; and we think such an agreement would be void." If an attorney were to consent to a reference, giving the arbitrator power to order something out of the usual course of business, his act would not bind his client. [BYLES, J.—Is not the question different where it arises between attorney and client, and where between party and party?] No doubt. [BYLES, J.—Lord Campbell, in Fray *v.* Vowles, 1 Ellis & Ellis 839, 847 (E. C. L. R. vol. 102), says: "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and bonâ fide (as the defendant is to be taken as having done), provided always that his client has given him no express directions to the contrary: but, where these directions have been given, such a step, *though perhaps binding as between him and *third parties*, is ultrà vires, as between him and his client."] What is the authority which is given by the client to his attorney when he instructs him to sue for a debt? Surely not to take back the goods, having secured his own costs! Besides, here, the compromise took place with the attorney's clerk, whose authority was disclaimed by his employer. In Bingham *v.* Allport, 1 Nev. & M. 398 (E. C. L. R. vol. 28),—where it was held that a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed authority from his master to receive the debt, was insufficient,—Littledale, J., said: "Although a party put his case into the hands of his attorney, who thereby becomes authorized to accept payment, it by no means follows that all the attorney's clerks have such an authority also." So, in Pennell *v.* Stephens, 7 C. B. 987 (E. C. L. R. vol. 62), a notice of an act of bankruptcy given by one attorney's clerk to another attorney's clerk (not being shown to be a managing clerk), was held to be insufficient: but the Court did not decide that the notice would have been good if the person to whom it was given *had* been managing clerk. [ERLE, C. J.—That must depend upon the circumstances. A managing clerk is often put in the place of the attorney himself.] [*810

Needham, in support of the rule.—Whatever be the relative liability as between the attorney and his client, if the attorney, even without authority, or against the express command of his client, chooses to enter into a compromise, as between party and party the client is bound by it. The defendant or his attorney can only communicate in all matters relating to the suit with the attorney upon the record. There is nothing in the case of Swinfen *v.* Swinfen, in any of its stages, whether in equity or in the common law Courts, which at all conflicts with that doctrine. The *compromise there was made by counsel, without the consent of the client, and in absolute defiance of the express and repeated opposition and remonstrance of the attorney. The ultimate result of that case is somewhat remarkable: the Court of Common Pleas declined to enforce the arrangement by attachment,—1 C. B. N. S. 364; the Court of Chancery refused to enforce it on a bill for a specific performance,—27 Law J., Chan. 85, [*811

2 De Gex & Jones 381, 21 Law J., Chan. 491; and a new trial of the issue was directed, at which a verdict was found for the plaintiff, and this verdict was upheld,—28 Law J., Chan. 849. In Thomas *v.* Harris, 27 Law J., Exch. 353, upon a motion for a new trial on the ground that the damages were excessive, an offer having been made, which the plaintiff's counsel, in the absence of his client, hesitated to accept, Pollock, C. B., without eliciting any expression of dissent from the rest of the Court, one of whom was Bramwell, B., said: "The plaintiff's counsel has authority to do so in the absence of his client. Let that be clearly understood. The late case of Swinfen *v.* Swinfen does not at all affect the ordinary authority of counsel. That was a case of something *beyond* the ordinary scope of their authority, and, as was alleged, against an express direction." [ERLE, C. J.—After verdict given, the plaintiff's counsel was pleased to say that the jury had been too liberal!] Thomas *v.* Harris was cited without disapprobation in Fray *v.* Voules, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102), where Lord Campbell says: "An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he does so reasonably, skilfully, and bonâ fide, provided always that his client has given him no express directions to the contrary: but, where these directions have been given, such a step, though perhaps binding as between him and third parties, is ultrà vires as
*812] *between him and his client. I do not agree with Mr. *Kennedy* that the attorney would be bound, in pursuance of his client's directions, to carry on the suit in a manner which he thought dangerous or absurd: but, if he chooses, after those directions, to carry it on at all, he is bound not to act contrary to those directions, and is guilty of a breach of duty if he does. This is a question as to the relation between attorney and client: and my view of it must not be considered as affecting the question of the relation between counsel and client, or the relation between the client and the opposite party in the cause." That distinction was acted upon in this Court in the recent case of Chown *v.* Parrott, 14 C. B. N. S. 74 (E. C. L. R. vol. 108), where it was held that an attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts bonâ fide and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. Erle, C. J., there says: "I apprehend the rule of law is well established, that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client, is, because the attorney is his general agent for that purpose. I think that is established in Fray *v.* Voules, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102), where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to do so, is guilty of a breach of duty. Two of the Judges say that it depends upon the contract in each particular case, and hold (which was sufficient for the decision of that case) that the action lay against the attorney there, because he was prohibited; which would seem to imply, that, if he had not been expressly prohibited from compromising, the compromise would have been a lawful act on his part."

*ERLE, C. J.—I am of opinion that this rule should be made absolute. The action is brought to recover the price of a piano-forte sold and delivered by the plaintiffs to the defendant. The plaintiffs' attorney having agreed with the defendant's attorneys to settle the action by allowing the defendant to return the piano-forte and to pay the costs (agreed at 9*l.*) by certain instalments, the plaintiffs repudiate the arrangement and now contend that their attorney had no authority to compromise the matter as he did. The defendant, on the other hand, insists that the attorney was warranted by the general authority he had as the attorney on the record, to settle in the way he judged most beneficial for his client. I do not limit my judgment to the consideration of the question as between the parties. It is clear that there was no express prohibition to the attorney to compromise; and the question for us to determine, is, whether the general retainer as attorney gave authority to compromise the action in this way. It is conceded that the attorney on the record has a general control and authority over the procedure in the action, and that it is competent to him to settle the action by taking a less sum than that demanded by the plaintiff. But it is said he has no authority to take goods for money. I do not see why he should not. If the cause had proceeded to its natural result,—to judgment and a writ of fi. fa.,—for aught I know the sheriff might taken this very piano in execution. I am unable, therefore, to say that the plaintiff's attorney has in any respect gone out of the ordinary and proper course of his duty in the arrangement he has effected. The case of Chown *v.* Parrott, 14 C. B. N. S. 74 (E. C. L. R. vol. 108), appears to me to lay down a proposition quite wide enough to authorize my judgment on this occasion. In Fray *v.* Voules, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102), the attorney was expressly directed by his *client not to enter into any compromise: and, though he was held to be liable to an action for having done so, as between the parties the arrangement was allowed to stand. Swinfen *v.* Swinfen was remarkable in all its circumstances, and in the course of litigation to which it gave rise. It can hardly be referred to as a decision which is to afford a guide in any case not similarly circumstanced. The judgment of the Master of the Rolls went very much upon the ground of the extraordinary departure from the usual course of events on the trial of an issue directed to inform the conscience of the Court of Chancery. They are to my mind to be considered as applicable only to the peculiar state of facts disclosed throughout every stage of that eventful cause.

[*813

[*814

BYLES, J.—I am of the same opinion. No authority has been cited before us to show that an attorney, who has the legal management of the cause, has not power in the bonâ fide exercise of reasonable care and skill to compromise an action in any manner he may find to be for the interest of his client. In the first discussion of the question in this Court in Swinfen *v.* Swinfen, 18 C. B. 485 (E. C. L. R. vol. 86), as to the authority of the counsel to compromise, the then Chief Justice took no part; but Cresswell, J., Williams, J., and Willes, J., all agreed that counsel had such authority. Cresswell, J., thus expresses himself,—"It is said that the compromise which was entered into by the counsel for the respective parties at Stafford was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the Court

cannot for a moment listen to an objection of that sort; and I am glad to find that there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her
*815] behalf assented to. I think it would be most fatal *to the due administration of justice, if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this: for, if the client or the attorney has reason to think that the counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the Court. But, if counsel, duly instructed, take upon himself to consent to a compromise which he in the exercise of a sound discretion judges to be for the interest of his client, the Court will not inquire into the existence or the extent of his authority." Williams, J., says,—"Without pretending to define the precise limits of the authority of counsel, it is enough on the present occasion to say that I entirely concur with my Brother Cresswell in holding that Mrs. Swinfen is bound by the compact entered into on her behalf at the trial." So Willes, J., says,—"As to the authority of counsel to bind the client by arrangements entered into in Court, I agree entirely with what has fallen from my Brother Cresswell." When the case afterwards came before the Court on the motion for an attachment, Crowder, J., begins his judgment with saying,—"As I have the misfortune to differ from the opinion expressed by my learned Brothers when the former rule was discharged, *and to which opinion they still adhere*," &c. So that, so far as the common-law Courts are concerned, the rule seems to have been laid down in wider terms than are necessary here. I agree with my Lord that the opinions expressed by the Master of the Rolls and the Lords Justices were addressed to the peculiar circumstances of the case before them.

KEATING, J.—I am quite of the same opinion. If the rule were not as we now lay it down, great inconvenience and much protracted
*816] litigation would be the *result. The attorney (for, I take the act of the managing clerk for this purpose to be the act of the attorney himself) here has compromised, not by taking other goods in satisfaction of the debt instead of money,—though I do not say that he might not even have done that,—but the very goods which were the subject of the action. It seems to me that this is within the most usual and limited notion of the authority of the attorney. I may take this opportunity of saying that the case of Swinfen *v.* Swinfen, so far as the decision in this Court is concerned, has not been fully understood; because, not only the three Judges (18 C. B. 485 (E. C. L. R. vol. 86)) adhered to the opinion they there expressed, but, further, the motion which was afterwards refused (1 C. B. N. S. 364 (E. C. L. R. vol. 87)), was for an attachment for disobeying a rule of Court. The opinions of the majority were not allowed to prevail, because it was thought, and properly, that, if one member of the Court entertained a doubt, it was not a proper case for the exercise of the summary coercive power of the Court. There is no difficulty of that sort here. In the Court of Chancery the case of Swinfen *v.* Swinfen was treated as one resting on very peculiar grounds.

MONTAGUE SMITH, J.—I am of the same opinion. The attorney is the general agent of the client in all matters which may reasonably be

expected to arise for decision in the cause. Every one must reasonably expect that a cause may not be carried to its natural conclusion, and that it is proper and usual, and often necessary, to compromise. The authorities seem to me to establish clearly that the attorney has power to compromise the action in a fair and reasonable manner. The question is, whether the compromise here is fairly within the limits of the authority. I cannot conceive a case more clearly within it than this. Suppose the case proceeded to judgment in the ordinary *course, the plaintiffs would have had an execution against the defendant's goods, and the sheriff would have seized, [*817 amongst other things, perhaps this very piano-forte. In the exercise of his discretion, the attorney thought it better to accept the defendant's offer to restore the piano-forte, before any further expenses were incurred. I think it would be most unfortunate for clients as well as for attorneys, if the latter had not power to make compromises. There may be in the progress of a cause a moment when an opportunity to settle a matter advantageously for the client presents itself, which may not occur again, and so the advantage would be lost if the attorney delayed in order to consult his client's wishes upon the subject. Upon principle, therefore, as well as upon authority, I am of opinion that this compromise must be upheld. Rule absolute.(a)

(a) The attorney would, no doubt, in many cases exercise a sound discretion in accepting goods in satisfaction of the debt sued for: but it is difficult to see how it can be laid down as a rule of law that he has absolute authority to exercise such a discretion on the subject. The dictum is thrown out for the first time, and certainly requires much consideration. There would seem to be no real objection on the score of expediency to the attorney's taking a bill of exchange, or goods which are readily convertible into money: but it might be inconvenient if he could accept any description of goods,—an African lion, or a Bengal tiger, for instance,—and yet those who argue for the proposition here suggested must go this length, for it is not a question of degree. It is no argument, it is conceived, to say that these inconvenient animals might be the only available property to satisfy an execution. The sheriff has no discretion: he *must* seize *all* property, and convert it into money. Besides, if the goods seized by the sheriff should prove inadequate to satisfy the debt, the plaintiff has a further remedy for the balance: he may issue a ca. sa. But not so where the attorney makes a compromise which falls short of *complete* satisfaction.

*FOWLER and Another *v.* THE ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY (Limited). [*818

April 25.

1. A policy was effected on a Prussian ship valued at 2500*l.*, against such risks only as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempt thereof,"—with a stipulation that the insurers "should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The ship was detained by an embargo in a Danish port, after the breaking out of hostilities between that power and Germany:—Held, that the right of the assured to claim for *a total loss* became vested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, and was afterwards (and after action brought) restored, and arrived in safety in London.

2. Held also, that the entry of the fact of the embargo in Lloyd's "Loss Book," however the intelligence might have been received, was sufficient to satisfy the term "official news" in the policy.

THIS was an action brought to recover for a total loss on a policy on ship.

The first count of the declaration stated that the plaintiffs caused to be made a policy of insurance purporting thereby and containing therein, that, it having been proposed to the defendants by the plaintiffs, as well in their own name as for and in the name or names of all and every other person or persons to whom the subject-matter of the said policy did, might, or should appertain in part or in all, to make with the defendants the insurance thereinafter mentioned and described, the defendants did, in consideration of the said person or persons effecting the said policy promising to pay to the defendants the sum of 25*l.* as a premium at and after the rate of 1*l.* per cent. for such insurance, take upon themselves the burthen of such insurance to the amount of 2500*l.*; which insurance was thereby declared to be upon the ship or vessel called the Ernest Jacob, valued at 2500*l.*, lost or not lost, at or from Riga to London; and it was thereby agreed that the said insurance should be only against such risks as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempts thereof," and *that the defendants should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation;* and the defendants thereby agreed that it should be lawful for the said ship or vessel in
*819] the *voyage so insured as aforesaid, to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to the said insurance; and it was thereby further agreed, that, in case of any loss or misfortune, it should be lawful to the assured, their factors, servants, and assigns, to sue, labour, &c., and it was thereby expressly agreed and declared that the acts of insurer or insured in recovering, saving, or preserving the property insured, should not be considered a waiver or acceptance of abandonment; and it was thereby declared and agreed that the said ship should be and was warranted free from average under 3*l.* per cent., unless general, or the ship should be stranded, sunk, or burnt: Averment, that the plaintiffs paid to the defendants the said sum of 25*l.* accordingly, and the defendants thereupon became insurers to the plaintiffs of the said sum of 2500*l.* upon the terms aforesaid, in respect of the premises, and duly executed the said policy accordingly: that, before the happening of the loss thereinafter mentioned, the said ship set sail and departed on the voyage mentioned in the said policy, and the plaintiffs were at the time of the making of the said policy, and at the commencement of the said risk, and thence continually until and at the time of the loss thereinafter mentioned, interested in the subject-matter of the said insurance, to the value and amount of all moneys ever insured thereon, and that the said insurance was made for their use and benefit and on their account: that, after the commencement of the said risk, and during its continuance, and whilst the said policy was in full force, the said ship was seized and detained under an embargo by the King of Denmark, being one of the perils insured against by the said policy, and the plaintiffs thereby sustained a great loss, within the meaning
*820] of the said policy: that, before action brought, thirty *days after receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy: and that, before action brought, all conditions and warranties were fulfilled, and all things were done and happened, and all times elapsed,

necessary to entitle the plaintiffs to sue the defendants for the matters mentioned in this declaration, and to be paid by the defendants the said sum of 2500*l.* so insured by them, and interest thereon: Breach, that the defendants had not indemnified the plaintiffs against the said loss, or paid the said sum of 2500*l.* and interest, or any part thereof, and the same remained wholly unpaid and in arrear, contrary to and in violation of the terms and provisions of the said policy of insurance.

There was also a count for money lent, money received, interest, and money found due on accounts stated. Claim, 3000*l.*

The defendants pleaded,—first, as to the first count so far as related to the alleged total loss of the ship, a denial that the said ship was detained under an embargo by the King of Denmark until after the lapse of thirty days after the receipt of official news of the said seizure, and that the plaintiffs thereby sustained loss within the meaning of the said policy, and that before action brought thirty days after the receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy.

Secondly, as to the said first count so far as related to the alleged detention of the said ship until after the lapse of thirty days after the receipt of official news of the said seizure, and so far as related to the alleged total loss of the said ship, and the causes of action in respect thereof,—that, at the time of the alleged seizure and detention under the said embargo, the said ship was in the course of the said voyage lying in a Danish *Harbour, to wit, Elsinore, and was and still is a [*821
Prussian ship, and the property of certain persons subjects to the King of Prussia, and that war had broken out and was then being carried on between the King of Denmark and certain other powers, to wit, amongst others, with the King of Prussia, and that the said ship had been and was seized and detained under the said embargo by the King of Denmark as and being enemy's property, to wit, the property of the said subjects of the King of Prussia: that, after the alleged seizure and detention under the said embargo, and within the period of thirty days therefrom, and before thirty days after the receipt of official news of the said seizure and detention had elapsed, within the true intent and meaning of the said policy, and before action, to wit, within twelve days after the said seizure and detention, a decree was duly made in that behalf, and promulgated by the King of Denmark, to wit, on the 15th of February, 1864, a correct translation of which decree is in the words and of the tenor and effect as follows, that is to say,—"Decree respecting time to be allowed to the enemy's vessels now under embargo, for quitting Danish harbours. On a representation being made to the King, His Majesty resolved, under date of the 13th instant, that, until the 1st of April next, the enemy's vessels now lying under embargo in Danish harbours and fiords shall be permitted to depart unmolested, in ballast, or laden with the cargo with which they arrived, and furnished with a letter of safe conduct to any harbour which they shall themselves designate, provided it be not blockaded; under proviso of reciprocity on the part of the governments interested. Ministry of Marine, Feb. 15th, 1864:" that afterwards, and before thirty days after receipt of official news of the said seizure

*822] and detention had elapsed, within the true intent and *meaning of the said policy, and before suit, all the conditions of the said decree were and had been complied with on the part of the government interested in the said decree and in the said ship, to wit, the government of Prussia, and the said embargo was by force of the said decree and such compliance with the conditions thereof as aforesaid taken off the said ship, and she was left at liberty to prosecute her said voyage, and could and might have obtained and would on application have been furnished with, a letter of safe conduct for that purpose,—of all which said premises the plaintiffs always had notice: and that the said ship afterwards in fact sailed upon her said voyage, and arrived in London and completed her said voyage in safety.

Thirdly, as to the first count except so far as related to the alleged detention of the said ship, until after the lapse of thirty days after receipt of official intelligence of the said seizure, and except as to the alleged total loss of the said ship, the defendant brought into Court 2*l*., and said that the same was sufficient to satisfy the plaintiffs' claim in respect of the matters therein pleaded to.

Fourthly, to the rest of the declaration, never indebted. Damages ultrà, and issue.

The cause was tried before Erle, C. J., and a special jury, at the sittings in London after last Michaelmas Term, when the following facts appeared in evidence: The plaintiffs are merchants carrying on business in London, and also at Memel, in Prussia. In the month of November, 1863, the Prussian ship Ernst Jacob, of which the plaintiff Henry Fowler, who is a Prussian subject, was the registered owner, sailed from Riga to London with a cargo of timber. She met with bad weather, and the captain was in consequence compelled to cut away the masts and to put into Elsinore under heavy average. She *823] arrived at that port on the *4th of December, and the necessary repairs were forthwith commenced, and were in due course completed. The ship was already insured against the ordinary perils: but, war being at this time threatened between Denmark and the German powers, the plaintiffs were desirous of effecting a policy to cover all risks which might result from hostilities; and they accordingly gave instructions to Messrs. Bevington & Co., their brokers, to effect a policy, which they succeeded in doing with the defendants in the form and upon the terms mentioned in the first count of the declaration.

Annexed to the policy was the following memorandum:—

"Policy No. 4984 for 2500*l*., by the Ernst Jacob, Captain ———, from Memel to London. The annexed insurance is declared to be against all risks whatsoever, British as well as Foreign capture, seizure, and detention, included. Detention for the period of six months to be deemed equivalent to a condemnation.

"London, 15th December, 1863."

The material clause in the policy,—"to pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation,"—was inserted in pursuance of a practice which had recently sprung up, the period within which the underwriters are to pay after capture being matter of bargain in each particular case: but the principle intended to be established is always the same viz.,

a positive engagement on the part of the underwriters to pay a total loss at the expiration of the specified time, without waiting the result of proceedings in a Prize Court for condemnation of the vessel.

The repairs of the vessel proceeded at Elsinore; and by the end of January, 1864, they had so far progressed that the ship was in a position again to receive *her cargo, and the captain had commenced reloading it, although the vessel was not quite fit to [*824 proceed to sea. In this state of things, war was declared between Denmark and Prussia; and on the 3d of February an embargo was laid on the Ernst Jacob, at Elsinore, by the Danish government. *The plaintiffs' correspondents at Elsinore* immediately transmitted to them in London this information by telegram, as follows,—"Danish government has laid embargo on Ernst Jacob. War with Germany commenced. Inform Fowler in Memel." On receipt of this telegram, the plaintiffs immediately took it to Lloyd's, and handed it to Bevington & Co., their brokers, who took it to the secretary's office.

The way in which losses and accidents are usually notified at Lloyd's is as follows:—In the underwriters' room there is a board called the "Notice-board," upon which notices are affixed. There is is also a book called the "Loss-book," in which entries of losses are made. The notices affixed on the notice-board are not confined to losses, but extend to all intelligence which may be deemed important to underwriters for the purposes of their business. No notice can be affixed on the board, and no entry can be made in the Loss-book, but by one of the clerks in the secretary's office: and it is the duty of one of the committee of Lloyd's to be in constant attendance, in order that he may be appealed to in case of difficulty upon any such point. If the information of a loss is not deemed sufficiently authentic to be inserted in the Loss-book, it is merely affixed to the notice-board: but, if it comes from one of Lloyd's agents, or the accuracy of the intelligence is otherwise made clear, it is at once entered in the Loss-book.

On the morning of the day following the receipt of the telegram by the plaintiffs, viz. on the 4th of February, a telegram was received at Lloyd's from their *agent at Elsinore, conveying information [*825 of the embargo upon the Ernst Jacob, and thereupon the following entry was made by the secretary in the Loss book, "The Ernst Jacob, from Riga to London, has been laid under embargo at Elsinore."

On the 5th of February, the plaintiffs' brokers gave the defendants notice of abandonment.

The decree of the 15th of February, 1864, as set out in the second plea, was subject to reciprocity on the part of the governments interested. This act of reciprocity did not take place until the 13th of March, on which day the Prussian government formally assented to the terms of the decree of the Danish government. The embargo, however, was not taken off until the 17th of March. The Ernst Jacob did not sail from Elsinore until the 17th of April. She arrived in safety in London on the 29th of April,—the captain having procured the money for the repairs at Elsinore on bottomry.

After the arrival of the ship in London and the discharge of her

cargo, she was sold by auction, for account of whom it might concern, and realized 1381*l.* 9*s.* 6*d.*

The writ in this action issued on the 21st of March, 1864.

The vessel had never in fact been taken out of the possession of the master and crew.

Two witnesses who were called for the plaintiffs stated that the news of the embargo, if entered in Lloyd's book, would be treated as "official," and as primâ facie evidence of a loss; but they disclaimed the notion that "official news" had any particular technical meaning. The jury adopted this view.

On the part of the defendants it was submitted that it was for the Court to construe the meaning of the policy, and that, to make the
*826] news of the embargo *official, it must be authenticated as a matter of official duty at the place whence it came; that a communication from an agent of Lloyd's at Elsinore might be deemed official,—the object of the underwriters being that there might be some evidence of the loss beyond the bare statement of a party interested; and that the mere insertion of it in a book at Lloyd's could not make it official.

Under the direction of the Lord Chief Justice, a verdict was entered for the plaintiffs as for a total loss, subject to a motion.

Mellish, Q. C., accordingly, in Hilary Term last, obtained a rule calling upon the plaintiffs to show cause why the verdict entered for them on the pleas relating to total loss should not be set aside, and instead thereof a verdict be entered thereon for the defendant, on the ground that the loss ceased to be total when the embargo was taken off,—the plaintiffs to be at liberty to contend, if necessary, at the time of showing cause, that they were entitled to a verdict for "partial loss," if not for total loss. He also moved on the ground that the news of the loss was not "official" within the meaning of the policy: but upon this the rule was refused.

Lush, Q. C., and *Sir G. Honyman* now showed cause.—The engagement in the policy is that "the insurers shall pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." Here the embargo was laid on the vessel on the 3d of February, 1864, consequently the thirty days elapsed before the vessel by the reciprocation of the Prussian government (on the 13th of March) became free. The special words in this policy were inserted for the benefit of the assured. What would have been the rights
*827] *of the parties without those words? The authorities are clear, that, on seizure or embargo, by which the owner is deprived of the benefit of his vessel, he may immediately abandon, and bring an action for a total loss: the underwriter must pay for a total loss, even though the vessel should afterwards be restored. If the owner omits to give notice of abandonment, or delays bringing an action, and the vessel is restored in the mean time, he can only maintain an action for such damage as he has actually sustained. America and some other commercial countries give no effect to subsequent restoration. In 2 Arnould on Insurance, § 383, p. 1071, the subject of abandonment on capture is thus treated,—"The best general statement I have anywhere met with of the circumstances which confer on the assured on ship a primâ facie right to give notice of abandonment, is

contained in the following passage from the judgment of Mr. Justice Story in the American case of Peele *v.* The Merchants' Insurance Company, 3 Mason's Rep. 27: 'The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owners of the ship, as in cases of *capture*, &c.,—where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of *embargoes*, blockades, and arrests,—where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens,—where the injury is so extensive that by reason of it the ship is useless, and the making repairs would exceed her value.' First, therefore, the assured on the ship has a right to give notice of abandonment immediately he hears that his ship has been forcibly taken out of his possession and control by capture; for, from the moment of capture, he is deprived of the free disposal of his vessel, at all events for a time, and perhaps for *ever. 'The ship,' as Lord Mansfield [*828
says, 'is lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy.'(*a*) Immediately, therefore, the assured receives intelligence that his ship is captured, he has a right to give notice of abandonment; and he may insist on such notice, and recover as for a total loss, 'provided the capture, and the total loss occasioned thereby, continue to the time of bringing the action.'(*b*) If, however, before action brought, the ship be recaptured, and restored to the possession or control of her owners, either in an undamaged or only partially damaged state, the assured cannot insist on his notice of abandonment, and recover as for a total loss, even though the loss was total at the time he gave such notice." This rule gave rise to much inconvenience; and it is thus observed upon in 2 Kent's Commentaries, 10th edit. 437,—"The English rule is, that an abandonment, though rightly made, is not absolute, but it is liable to be controlled by subsequent events; and that, if the loss has ceased to be total before action, the abandonment becomes inoperative. The rule was suggested, but left undecided, in Hamilton *v.* Mendes, 2 Burr. 1198, but it was explicitly declared and settled in subsequent cases.(*c*) The English rule does not rest, however, without some distrust as to its solidity. It was much doubted in the House of Lords, by Lord Eldon, in Smith *v.* Robertson, 2 Dow. 474; every question as to the principle was expressly waived, and it has since been very much shaken."(*d*) But in the United *States a [*829
different rule prevails; and it is well settled in American jurisprudence that an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by subsequent events." To escape the inconvenience of that rule, the parties here stipulate by their contract that the loss shall be paid for as a total loss thirty days after receipt of official news of capture or embargo. If the words had been,—"to pay a total loss on receipt of official news of capture

(*a*) Per Lord Mansfield in Goss *v.* Withers, 2 Burr. 694.

(*b*) Per Lord Mansfield in Hamilton *v.* Mendes, 2 Burr. 1212.

(*c*) Bainbridge *v.* Neilson, 10 East 329, Patterson *v.* Ritchie, 4 M. & Selw. 393.

(*d*) See Holdsworth *v.* Wise, 7 B. & C. 794 (E. C. L. R. vol. 14), 1 M. & R. 673, and Naylor *v.* Taylor, 9 B. & C. 718 (E. C. L. R. vol. 15), 4 M. & R. 526.

or embargo,"—could any one have doubted that the right of action vested immediately on capture? As the clause stands, the assured are bound to wait the thirty days, at the expiration of which the right of action is vested. The underwriters seem to have been under an impression that they were conceding something by the words which follow,—"without waiting for condemnation." The obvious intention was, to secure to the assured something which otherwise they would not have, and to accelerate and secure the payment of a total loss irrespective of any proceeding of a prize Court. On the one hand, the clause binds the assured not to sue until the expiration of the thirty days; and, on the other, that the right of the assured shall be ascertained and fixed at the same period,—the obvious meaning of the parties being, that, in order to render the underwriters liable, the embargo must continue in force for thirty days. Here, that event has happened, and the right of the assured to sue for a total loss was complete. The construction sought to be put upon the clause on the part of the defendants would make it a stipulation solely for the benefit of the assurers. It will be said, that, as the ship was restored before the writ issued, the plaintiffs are in the same position as if this
*830] clause had not been inserted in the policy at all. *[MONTAGUE SMITH, J.—You say you had a vested right at the expiration of the thirty days, irrespective of what happened afterwards.] Precisely so. The object was to secure a certainty.

Mellish, Q. C., and *Archibald*, in support of the rule.—The general rule of our insurance law unquestionably is, that, if a vessel has been captured or detained, but before action brought she is restored, the loss ceases to be total, and becomes a partial loss only; the ground being, that insurance is a contract of indemnity, by which the assured is only entitled to be secured against the loss sustained at the time of action brought. The question is whether the words of this clause enure to alter that general rule of law, or whether they mean anything more than to indicate the time when a constructive loss is to become an absolute total loss. The construction contended for on the other side gives no meaning to the words "without waiting for condemnation." It is conceded, that, if the ship had been restored *within* the thirty days, the loss would not have been total. Embargo is not, like capture, a total loss at the time it is put on. In Arnould, § 387, Vol. 2, p. 1085, it is said: "The grounds of abandonment hitherto considered have been *capture*, barratrous seizure and carrying away of the ship by the crew (Falkner *v.* Ritchie, 2 M. & Selw. 290; Brown *v.* Smith, 1 Dow 349) and desertion of the ship at sea by the crew, as the necessary and sole means of saving their lives (Thornely *v.* Hebson, 2 B. & Ald. 513; Holdsworth *v.* Wise, 7 B. & C. 794 (E. C. L. R. vol. 14). 1 M. & R. 673): in all these cases we have seen that the assured has a vested *right to give notice of abandonment* on first hearing of the casualty, supposing the privation of his possession or control over the ship to have been once total; but that his right *to recover as for a total loss*
*831] *depends, in all cases alike, upon the state of the ship at the commencement of the action. Subject to the same limitations, there can be no doubt that *arrest*, *detention*, or *embargo* of the ship, whether by a hostile or friendly government, gives a primâ facie right of abandonment in all cases where there is an apparent proba-

bility that the owner's loss of the free use and disposal of his ship, once total, by the arrest or embargo, *may be of long, or at all events of very uncertain continuance.* Thus, where the ships of an American merchant resident at the time of action brought in this country, had been seized and detained by the French government *in their port of loading*, it was held, that, under a policy *at and from* such port, he might recover as for a total loss, upon due notice of abandonment, more especially as it appeared that the ships at the time of action brought were still detained, and had then been so for three years: Rotch *v.* Edie, 6 T. R. 413. Of course, if the arrest be only momentary in its duration, if it creates only a temporary obstruction of the *voyage*, without giving rise to any permanent loss of control over the *ship*, it cannot give any right to abandon." Here, the ship was never taken out of the possession of the captain. The repairs were going on all the time, and were not finished when the embargo was taken off. "Thus," continues Arnould, "where, on the occasion of a famine at Corfu, some Venetian cruisers, meeting at sea a Genoese ship laden with corn, carried her into Corfu, and, after taking out and paying for the corn, let the ship go free, this was decided in the Rota Court of Genoa to give no ground of abandonment to the assured on ship: Roccus, No. 60, cited by Emerigon, Ch. xii., s. 30, vol. 1, p. 527 (edit. 1827); and see Boulay-Paty's Commentary, Vol. 2, p. 219. So, where a British ship was detained eleven days by a British man-of-war, to prevent her *proceeding to a port where an embargo [*832 was laid on all British vessels, it was held that the assured on ship could not abandon on this ground: Foster *v.* Christie, 11 East 205. In France, the assured is allowed to give notice of abandonment immediately after *capture;* but, in case of detention by arrest or *embargo*, he is obliged to wait before doing so for different periods fixed by the 187th article of the Code de Commerce. 'Other laws,' says Mr. Benecke (Principles of Indemnity 349), 'make no distinction between capture and detention. Those of Prussia admit the abandonment when the liberation is uncertain or tedious. In Genoa and Leghorn, the assured may abandon when ship has been detained for three days. In Hamburg the assured cannot claim a total loss, until the ship or goods have been definitely condemned or irretrievably lost: Benecke 349. In this country no precise period is fixed; but *immediately* on hearing that his ship is detained by an embargo, the assured may give notice of abandonment, *subject, of course, as in all other like cases, to have his right to recover for a total loss defeated by the restoration of the ship before action brought.*" It is clear, therefore, that embargo is not like capture. The object of the special stipulation here is, to remove all uncertainty on that head: the intention was to treat the official intimation of capture or embargo as equivalent to a condemnation by a prize Court. In Hamilton *v.* Mendes, 2 Burr. 1210, Lord Mansfield says: "The plaintiff's demand is for an *indemnity.* His action, then, must be founded upon the *nature of his damnification*, as it really is at the time the action is brought. It is repugnant, upon a contract of *indemnity*, to recover as for a total loss, when the final event has decided that the damnification in truth is an *average*, or perhaps *no* loss at all. Whatever undoes the damnification, in whole

*833] or in part, must operate upon *the indemnity in the *same degree.* It is a contradiction in terms to bring an action for indemnity, when, upon the whole event, *no* damage has been sustained." In Brotherston *v.* Barber, 5 M. & Selw. 418, an insurance was effected on a ship from Rio de Janeiro to Liverpool, and the ship was captured, and afterwards recaptured, but in the interval, the assured, having received intelligence of the capture, gave notice of abandonment, and after the recapture the ship arrived at Liverpool, having sustained a partial damage. In an action for a total loss, it was held that the assured could only recover for a partial loss. "The cases," said Lord Ellenborough, "which have been the subject of this day's observation have all taken root in the doctrine of Lord Mansfield in Hamilton *v.* Mendes, in which it is laid down that an assured can only demand an indemnity; and consequently, his action must be founded upon the nature of his damnification as it really is at the time the action is brought. Now, if we inquire as to the nature of the injury sustained by this capture, followed by the recapture, what was it at the time when this action was brought? It seems to me that the only injury was, a retardation of the voyage during the time the ship was in the enemy's custody, and was diverted from her course to Liverpool." Notwithstanding the special clause introduced into this policy, it is still a contract of indemnity only.

ERLE, C. J.—I am of opinion that the plaintiffs are entitled to recover for a total loss. The only duty which is cast upon the Court, is, that of putting a construction upon a few words in this policy. The risks intended to be covered by it are those which are excluded by the clause "warranted free from capture, seizure, and detention, or *834] the consequences of any *attempt thereof." Then comes the clause which we are called upon to construe,—"to pay a loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." Leaving out the last four words "without waiting for condemnation," the clause contains a clear and unambiguous stipulation, that, when thirty days shall have elapsed after capture or embargo, the assured shall be entitled to claim for a total loss. Are we to reject the natural and proper construction, because we are unable to give any sensible meaning to the four words which follow? They may have been introduced out of abundant caution: but they cannot take away the clear effect of the other words. It seems that there was a particular risk: and, knowing the doubts which had been entertained as to the time for the commencement of the action, the parties contract that there shall be a vested right of action as for a total loss thirty days after the receipt of official news of capture or embargo. This was not a temporary embargo, but an embargo by reason of the declaration of war. I am clearly of opinion, that, official news of the embargo having arrived more than thirty days, the plaintiffs were entitled to claim as for a total loss.

BYLES, J.—I am of the same opinion. The words "to pay a total loss thirty days after receipt of official news of capture or embargo," if they had stood alone, would have been perfectly clear. If any ambiguity or difficulty is created by the last four words of the clause, "without waiting for condemnation," it is to be remembered that this is a policy against capture or embargo only. Mention is made

of the sentence of a prize Court. But it still leaves the positive engagement, that, after the expiration of thirty days, there shall be a total loss. In my opinion the contract is susceptible of no other construction.

*MONTAGUE SMITH, J.—I am of the same opinion.—We are bound to give a meaning to this special clause in the policy, [*835 "to pay a loss thirty days after receipt of official news of capture or embargo." The proper construction seems to me to be, that the assured had a vested right of action for a total loss upon the happening of the event contemplated. The event contemplated has happened. It is said that ambiguity is introduced by the last four words of the clause, "without waiting for condemnation." It may be that the parties intended to make the delay of thirty days equivalent to a condemnation. In any view the plaintiffs are clearly entitled to recover. The defendant's mode of reading the contract would deprive the plaintiffs of their right of action if the vessel should be restored. That would be a restriction of the rights of the assured which the parties have not expressed and clearly could not have intended. The best construction I can put upon the language of the policy, is, that the event has happened which was to entitle the plaintiffs to recover for a total loss. Rule discharged.

FARNWORTH and Another *v.* HYDE. *Feb.* 27.

A vessel was stranded and frozen up in the St. Lawrence in the beginning of the Winter; and, on the breaking up of the ice in the Spring, she was found to be in imminent peril, and, after several surveys, both ship and cargo were sold under circumstances which the jury found to constitute a reasonable necessity for an immediate sale,—the expense of getting the ship afloat and repairing her, and of forwarding the cargo (timber) to its destination (Liverpool) being greater than their value when so respectively repaired and carried:—Held, that the underwriters on cargo were liable as for a total loss, without notice of abandonment; the information of the loss and of the sale having both reached the assured at the same time.

THIS was an action on a policy of insurance on timber per the ship Avon from Quebec to Liverpool. The plaintiffs claimed for a total loss.

*The cause was tried before Pigott, B., at the last Summer [*836 Assizes at Liverpool, when the following facts appeared in evidence:—The policy was effected on the 13th of November, 1861, and the ship sailed from Quebec, with a cargo of timber the value of which was 4300*l.*, on the 20th of November. On the 1st of December she anchored at Brandy-ports, on the river St. Lawrence. On the 2d she took the ground and unshipped her rudder. Being in this disabled condition, the master telegraphed to Quebec for a steam-tug, but none was to be had. Eventually the ship settled on the rocks, and the ice closing round her she remained fast. On the 10th of December, the ship and cargo were surveyed by Coleman and Nesbitt, two surveyors, and again on the 16th of January, 1862, by the same persons. Finding the vessel much crushed and damaged, those gentlemen advised her sale for the benefit of all concerned. The surveys, however, being laid before Lloyd's surveyor at Quebec, he declared against the sale of the ship: consequently nothing was then done,

except that the crew were discharged. The Avon lay in this state until the ice in the St. Lawrence began to break up. The ship and cargo were again surveyed on the 29th and 30th of April, and 1st and 2d of May, when the surveyors advised the immediate sale of both. They were accordingly sold (separately) by auction on the 7th of May, and both ship and cargo were bought by the same persons. Messrs. Julien,—the former for 349*l.* 6*s.* 4*d.*, the latter for 550*l.* The cargo was afterwards taken out of her by the purchasers, and the ship got off and repaired: the former was ultimately sold for 1400*l.*; and the latter (after being got off and repaired at an expense exceeding 3000*l.*) was sold at a considerable loss.

Notice to the assured of the sale and of the necessity for it reached them at the same time: consequently there was no notice of abandonment given.

*837] *A great number of depositions were put in to show the hopeless condition of the vessel at the time of the sale, and the impossibility by reason of the costs of rafting and carriage of getting the cargo forwarded profitably by any other vessel.

The defendant, who was an insurer for 150*l.*, had paid 34*l.* 10*s.* into Court to cover an average loss estimated at 23 per cent.; and it was agreed that, if the loss was to be regarded as an average loss only, the amount should be settled by an average-stater out of Court.

The following appeared upon the learned Judge's notes as the estimate of the expenses which would have been necessarily incurred in forwarding the cargo to its destination by another vessel:—

"Cost of landing	350	0	0
"Cost of rafting and conveyance to Quebec	700	0	0
"Original freight to be re-incurred	1556	0	0
"Extra freight	700	0	0
"Rising freight (*a*)	269	0	0
"Deterioration, 12 per cent.	516	0	0
	£4091	0	0."

Deducting this sum of 4091*l.* from the estimated value of the cargo when arrived at Liverpool, 4300*l.*, there remained a balance of 209*l.* on the cargo.

The learned Judge put two questions to the jury,—first, whether the sale of the ship was justifiable. This, he told them, depended upon whether or not a prudent owner uninsured, being on the spot, would have sold her; as to which his judgment would be governed by the consideration whether if he got her off and repaired her, her

*838] value when repaired would *exceed the cost of the repairs. The second question was, whether or not it was right to sell the cargo. This, the learned Baron said, would depend on whether or not the cargo could have been practically (to be understood in a commercial sense) carried to its destination: which, again, he said, would depend on whether, under all the circumstances, the cost of carrying the cargo, added to the amount of depreciation, would have left any appreciable margin of profit to the owners. As to the 209*l.*,

(*a*) Which was explained to mean the difference in consequence of the rise in freights between the time of loading the Avon in November, 1861, and the reopening of the navigation in the Spring of 1862.

the learned Judge said the jury might say whether anything was to be deducted for loss of quantity.

The jury answered the two questions above mentioned in the affirmative: and a verdict was thereupon entered for the plaintiffs, subject to leave reserved to the defendant to move to enter the verdict for him, or to reduce the damages.

E. James, Q. C., accordingly, in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—first, that there was no evidence of a total loss,—secondly, that there was no evidence of partial loss exceeding the sum paid into Court; or to reduce the damages to the sum actually due as for a partial loss. He submitted, that, the cargo remaining in specie, if it could be carried to its destination, the master was bound to forward it, and could not justify treating the loss as total, and selling the goods. He referred to Knight *v.* Faith, 15 Q. B. 649, and The Great Indian Peninsula Railway Company *v.* Saunders, 1 Best & Smith 41 (E. C. L. R. vol. 101), in error 2 Best & Smith 266 (E. C. L. R. vol. 110).

Brett, Q. C., *Mellish*, Q. C., and *C. Russell* showed cause.—There was abundant evidence to show that the ship was a total loss, and that the ship and cargo were *necessarily and properly sold: and, the property having passed by the sale to the purchasers, there was nothing [*839 that could be the subject of abandonment. In Rosetto *v.* Gurney, 11 C. B. 176 (E. C. L. R. vol. 73), a cargo consisting of 3700 quarters of wheat, valued at 6400*l.*, was insured on a voyage from Odessa to Liverpool. Shortly after she sailed, the vessel received sea-damage, and was compelled to put back to refit. The repairs and expenses amounted to 1800*l.*, to raise which the master hypothecated the ship and cargo for 1850*l.*, by a bottomry-bond payable ten days after the ship's arrival at the port of delivery. The ship again sailed, and, before her arrival, was wrecked, and carried into Cork by salvors, where, the cargo being found to be considerably damaged, and the vessel not worth repairing, both were sold. The jury found that about one-half of the wheat might have been dried, and conveyed from Cork to Liverpool, at a cost less than its value on its arrival at Liverpool. The vessel and cargo were taken possession of by the Court of Admiralty (who directed their sale), by whom 450*l.* and costs were awarded to the salvors, and 1881*l.* and costs to the holders of the bottomry-bond. It was held that the evidence disclosed a partial loss only: that, in ascertaining whether or not it was practicable to send the whole or any part of the cargo to its port of destination in a marketable state, the jury were bound to take into consideration the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transhipping it into a new bottom, and the cost of the difference of transit, if it could only be effected at a higher than the original rate of freight,—adding the salvage allowed in proportion to the value of the cargo saved; but not the debt and costs paid to the holders of the bottomry-bond: and that the loss would be total or partial as the aggregate of these exceeded or fell short *of the value of the cargo [*840 when delivered at the port of discharge. Jervis, C. J., in delivering the judgment of the Court, lays down the law in conformity with all the modern cases, thus,—"As a general rule, where the

whole or any part of a cargo is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss. Whether the cargo can practically be forwarded to its port of destination, involves a consideration of all the circumstances of each particular case: and this word 'practically,' as explained by my Brother Maule, in Moss *v.* Smith, 9 C. B. 94 (E. C. L. R. vol. 67), comprehends the condition upon which the difference between a total and partial loss depends. 'In matters of business,' says that learned Judge, 'a thing is commonly treated as *impossible*, when it is impracticable, and as *impracticable*, when it cannot be done without laying out more money than the thing is worth.' Thus, if goods are reduced to such a state, by sea-damage, as to be worth nothing if sent on, the master may sell them, and the owner may recover as for a constructive total loss: Parry *v.* Aberdein, 9 B. & C. 411 (E. C. L. R. vol. 17), 4 M. & R. 343. So, if from sea-damage the goods cease to retain their original character, for instance, from the progress of putrefaction, the master is justified in selling, and the assured may recover a total loss: Roux *v.* Salvador, 3 N. C. 266 (E. C. L. R. vol. 32), 4 Scott 1. On the other hand, if the damage is reparable, the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it, and the assured cannot recover *841] *as for a constructive total loss." In the case of a ship, the test is whether a prudent owner uninsured, if on the spot, would have repaired her. In the case of goods, it would depend on the state of the market at the place where the misfortune happens. In all other respects, the question as to ship and cargo is exactly the same. Reimer *v.* Ringrose, 6 Exch. 263,† is also an authority to show that the loss would be total, if the timber was placed in such circumstances, that, when brought home, it could not have been sold for an amount exceeding the expense of securing it and sending it to Liverpool. The question was put to the jury very much in the terms of Rosetto *v.* Gurney; and the direction is not now complained of. It may be, that, if the assured had received in England information as to the position of the vessel and her danger, and the advice given by the surveyors on the spot, they would have been bound to give the underwriters notice of abandonment. But, when they received the information there was nothing to abandon. The notice of the sale of the ship and cargo were received by them at the same time that they received notice of the situation of the ship. If the sale of the cargo was necessary and right at the time, it is a total loss. The only question is, was there any evidence for the jury that the sale was justifiable? It is clear, that, to constitute a total loss, it is not necessary that there should be a total annihilation of either ship or cargo: Cambridge *v.* Anderton, 2 B. & C. 691 (E. C. L. R. vol. 9), 4 D. & R. 203. [ERLE, C. J.—An urgent necessity for immediate sale dispenses with notice of abandonment.] In 1 Arnould on Insurance 241, it is said, that, "where the original ship is disabled, and there exist no means of

transhipment, or hope of any,—as, where the ship is cast away on some desolate and unfrequented coast,—the master might possibly be held empowered to sell the cargo if he had *the opportunity, even though it were neither sea-damaged nor of a perishable [*842 nature:" per Bayley, J., in Hunt *v.* The Royal Exchange Assurance Company, 5 M. & Selw. 56, 57. And see Idle *v.* The Royal Exchange Assurance Company, 8 Taunt. 755 (E. C. L. R. vol 4), 3 J. B. Moore 115: see also 3 Brod. & Bingh. 151 (*d*) (E. C. L. R. vol. 7). The question arose in King *v.* Walker, in error, 3 Hurlst. & Colt. 209, where Willes, J., in delivering the judgment of the Exchequer Chamber, says: "The vessel set sail upon a voyage from Moulmein to Falmouth, and by perils of the seas was so much strained and seriously damaged, that she was compelled to put into Simon's Bay, where she was surveyed, and it was ascertained that without an expenditure clearly beyond her value when repaired, she could not be made seaworthy or capable of continuing the voyage with cargo or in ballast; and it was doubtful, in consequence of the prevalent swell, whether she would bear heaving down in the course of repair. The master took the opinion of the Attorney-General of the Cape, and, acting under his advice to abandon and sell, sold the ship for the best price that could be obtained for her, 280*l.* gross,—124*l.* 7*s.* 7*d.* net. In making this sale the master appears to have acted with perfect honesty, and in such a manner as a prudent owner uninsured would have acted. The plaintiffs further insisted that the sale was a necessary act, at least in this sense, that, as expenses were running on, it was necessary to do something, and that no other rational course for the master to pursue can be suggested: see Somes *v.* Sugrue, 4 C. & P. 276 (E. C. L. R. vol. 19); Hunter *v.* Parker, 7 M. & W. 322;† and upon this the plaintiffs relied as showing an actual total loss, of course with benefit of salvage, but without any necessity for abandonment; and they relied upon Cambridge *v.* Anderton, 2 B. & C. 691 (E. C. L. R. vol. 9), 4 D. & R. 203 (E. C. L. R. vol. 16), the judgments in Moss *v.* Smith, 9 C. B. 94 (E. C. L. R. vol. 67), and that part of *the judgment in Knight *v.* Faith, 15 Q. B. 649 (E. C. [*843 L. R. vol. 69), in which Lord Campbell excepted the case of a bonâ fide sale by the master; to which may be added the statement in Marshall on Insurance (by Serjt. Shee), p. 450. And it may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no rational man would incur, and is therefore properly and in a sense necessarily sold for the old materials, and the case of a sunken vessel, of which some portion of the materials may be recovered, but which cannot be raised except by an extravagant expenditure such as no rational man would incur."

Then, if this was not a total loss, there is abundant evidence of a partial loss greatly exceeding 23 per cent. The mode of ascertaining an average loss on goods when arrived is well fixed.(*a*) But the ques-

(*a*) "A particular average on goods delivered at the port of destination, is adjusted on the gross proceeds or market value there, and is the same proportion of the value of the goods in the policy, whether open or valued, as the deficiency of the gross market value of the damaged goods compared to those of the sound is of the gross market value of the latter. That is to say, if the invoice price of the damaged goods in an open policy, or their value in a valued policy, is $1000, and they are sold at $6000 at the port of destination, and the same goods sound would have been worth there $1200, the loss is one-half, or $500."

tion here is, what is the rule where the goods are justifiably sold at an intermediate port. It is submitted that it makes it at once a salvage loss, and that the correct rule is, to pay the value in the policy, less the salvage: see Benecke Pr. of Indemnity 435; Stevens on Average, 5th edit. 83–85; Arnould on Insurance, Vol. 2, § 360. In 2 Phillips on Insurance, § 1463, it is said,—"In case of a salvage loss, that is, in one *where the insured damaged goods are sold at an intermediate port for the benefit of the assured and his under-*
*844] *writer*, the adjustment is precisely the same in respect of those goods as it is in a total loss. The voyage is broken up in respect of those goods, and the underwriter is liable to pay to the assured the amount at which they are insured, whether under an open or a valued policy, and the salvage, that is, the net proceeds of the goods, subject to all necessary charges, is to be credited to the underwriter." The sum paid into Court here is only on the amount of deterioration. The plaintiffs claim to be entitled to all the expenses and the increased freight they must have paid to bring the goods on to their destination.

E. James, Q. C., and *T. Jones*, in support of the rule.—The plaintiffs are not entitled to recover either in respect of a total loss, or of an average loss beyond the sum paid into Court. It is not denied on the part of the plaintiffs that notice of abandonment is necessary in the case of a constructive total loss whether of ship or of goods: Fleming *v.* Smith, 1 House of Lords Cases 513. No notice of abandonment was given here. If there could be a total loss, it was clearly constructive only, and therefore the underwriters were entitled to notice. There was no actual total loss of the ship: and, even if there was, it does not follow that there was an actual total loss of the cargo. Assuming that the master is justified in selling the cargo, where the ship is wrecked and the goods cannot in a mercantile sense be forwarded to their port of destination, the evidence here failed to establish that state of things. The goods being imperishable, they *must* be sent on if it be possible. It appears that the vessel took the ground in December, 1861. On the face of the surveys then made, there is nothing to show an actual total loss. Indeed, the plaintiffs themselves
*845] did not so treat *it. There may be said to be an actual total loss of the ship, when she founders or goes on shore, and by the violence of the winds and waves is broken up, or (as in Cambridge *v.* Anderton, 2 B. & C. 691 (E. C. L. R. vol. 9), 4 D. & R. 203 (E. C. L. R. vol. 16)) where she is upon a rock incapable of being got off and repaired. But, if the vessel retains the form and character of a ship, and is capable of being repaired, then arises the question whether or not the expense of the repairs will exceed the value of the ship when repaired. If she be repairable, there is no *actual* total loss: and, if repairable only at an expense exceeding her value when repaired, there is a constructive total loss; but there must be notice of abandonment, if only for form's sake. It was because the surveyors here found the vessel in such a state that the cost of getting her afloat and repairing her would exceed her value, that they recommended a sale. But that applied to the ship only. All the evidence points to a constructive total loss. The thing remaining in specie, capable of being carried on, it was the duty of the assured to give the underwriters notice of abandonment, so that they might exercise their own judg-

ment. [BYLES, J.—There is a great difference between the case of a vessel constructively lost, in this sense that she is incapable of being repaired save at an expense which would exceed her value when repaired, and that of a vessel sold, and justifiably sold: may not the latter be a case of actual total loss?] It has never been so laid down. It has always been understood that abandonment is necessary to vest in the underwriters all the property which before was in the assured. "The underwriter," says Lord Abinger, in delivering the judgment of the Court of error in Roux *v.* Salvador, 4 Scott 1, 32, 3 N. C. 266, 285 (E. C. L. R. vol. 32), "engages that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the *voyage, it becomes totally destroyed or annihilated, or [*846
if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though primâ facie a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention,(*a*) which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as for that of the underwriter, treat the case as one of a total loss, and demand the sum insured. *But, if he elects to do this, as the thing insured, or a portion of it, still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it,* and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may if he pleases take measures, at his own cost, for realizing or increasing that value." To make an actual total loss of *goods*, the specific character of *the article [*847
must be gone. "If," says Lord Abinger, in the case above referred to, "the goods are of an imperishable nature, if the assured become possessed of or can have the control over them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods, once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not

(*a*) See Fowler *v.* The English and Scottish Marine Insurance Company, antè, p. 818.

utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if by any circumstances over which he has no control they can never, or within no assignable period, be brought to their original destination: in any of these cases, the circumstance of their existing in specie at *that forced determination of the risk* is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." "In the case before us the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By
*848] the process of fermentation and putrefaction which had *commenced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold: and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods; they never could arrive; and, at the same moment when the intelligence of the loss arrived, all speculation was at an end." The whole ground upon which it was held that no abandonment was necessary there, was, that the goods were in such a state that if transhipped they must have lost the character of hides before they could have reached their destination. In Tunno *v.* Edwards, 12 East 488, Lord Ellenborough asks,— "Is it not an established and familiar rule of insurance law, that, where the *thing insured subsists in specie, and there is a chance of its recovery*, in order to make it a total loss there must be an abandonment?" The assured are bound to abandon as soon as they receive intelligence of a loss: Allwood *v.* Henckell, Marsh. Ins. (by Shee) 280, Park Ins. (by Hildyard) 399. In Hodgson *v.* Blakiston, Marsh. Ins. (by Shee) 281 n., Park Ins. (by Hildyard) 400 (*k*), it was held that a notice of abandonment was necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. All the authorities are considered in Knight *v.* Faith, 15 Q. B. 649 (E. C. L. R. vol. 69). There a ship insured for 1000*l.* for a year ending the 23d of September, was stranded, got
*849] *off, and brought into the harbour of Santa Cruz on the 16th of September. She remained there with her crew on board till the middle of October, and, during that time, was pumped, and her cargo was discharged into other vessels. Being then beached and surveyed, she was found so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being no dock-yard, workmen, or materials there; nor could she be taken to any port where she could prudently have been repaired. Afterwards,

in October, the master (who was a part owner and interested in the policy) sold her for the benefit of those whom it might concern; and she fetched 72*l*. No notice of abandonment was given. A special case, in an action against the underwriters, set forth these facts, stating also that the vessel "received her death blow" by the said perils of the sea on the 16th of September, but that the damage was not ascertained till the 24th. It was held that the sale by the master did not, nor did the other facts, constitute an actual total loss; and that, if there was a constructive total loss which would have entitled the assured to abandon, they could not recover for such loss, not having given notice of abandonment. [KEATING, J.—Does not Lord Campbell in that case except the case of a lawful sale from the necessity of a notice of abandonment?] His Lordship is referring to a totally different subject: he was dealing with the case of the sale of a ship by the master, who was also part owner. "Whether," he says, "notice of abandonment may be dispensed with where there has lawfully been a sale by the master, we are not now called upon to decide. Where she is reduced to a mere wreck, the solution of this question may be clear enough. Where she still retains the character of a ship, it may be attended with difficulty: but here we are of opinion, that, as against the insurers, the sale is *not shown to be lawful. It must [*850 be borne in mind that she remained in the character of a ship, capable of being repaired if there had been the means of repairing her at Santa Cruz; and that she might have been sent to other places where she might have been repaired, although not prudently. Could the master, who is a part owner, one of the assured, and a plaintiff on this record, under these circumstances sell the ship, and, without notice of abandonment, render the insurers liable for a total loss? The master's right to sell arises only in a case of necessity, which must be clearly shown, with full proof that everything was done optimâ fide, and for the real benefit of all concerned: Case of The Fanny and Elmira, Edwards Adm. R. 117, Cannan *v.* Meaburn, 1 Bingh. 243, 8 J. B. Moore 127. In Idle *v.* The Royal Exchange Assurance Company, 8 Taunt. 755 (E. C. L. R. vol. 4), 3 J. B. Moore 115 (E. C. L. R. vol. 4), where the jury found that the master, in selling the ship, had acted 'fairly and bonâ fide for the benefit of all concerned, and that the sale was honestly, fairly, and properly conducted,' this Court, upon a writ of error from the Court of Common Pleas (see 3 Brod. & B. 151, n.), held that the necessity and legality of the sale was not to be inferred from this finding. In Robertson *v.* Clarke, 1 Bingh. 445 (E. C. L. R. vol. 8), 8 J. B. Moore 622 (E. C. L. R. vol. 17), where a sale by the master was upheld, Lord Gifford said: 'This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be bonâ fide for the benefit of all concerned, and must be strictly watched.'" The substance of the decision in Knight *v.* Faith, is, that, unless the ship is at the bottom of the sea, or in a like irrecoverable condition, or that the goods are irreclaimably gone, notice of abandonment must be given. Here, the goods existed in specie, and were likely so to remain. Speaking of the right of the master to sell *the ship where her [*851 repair is impracticable or to be effected only at a cost exceeding her value when repaired, Mr. Arnould says,—Vol. 2, p. 1090 (2d

edit.),—"It must, however, in all these cases, be most carefully borne in mind that the sole point to be attended to in ascertaining whether the circumstances are such as to entitle the assured to abandon and recover as for a total loss is, *not the mere fact of a sale by the master*, but *the state to which the ship was reduced by the perils insured against, which justified that sale on the ground of necessity.* The mere fact of sale itself, irrespective of the state of the ship, which made it necessary, can give the assured no right to abandon: 'there is no such head of insurance law as loss by sale,'—per Bayley, J., in Gardner *v.* Salvador, 1 M. & Rob. 117. The assured in fact abandons, as it is well expressed by Mr. Phillips, '*not because the sale has given the right, but because the events which induced the sale had occasioned a total loss:*' 2 Phillips on Insurance, p. 296." At p. 1034, Mr. Arnould refers to Bell *v.* Nixon, Holt N. P. C. 423 (E. C. L. R. vol. 3). "A ship, after sailing seaworthy on her voyage from Hull to Quebec, was overtaken by bad weather, and obliged to run into Limerick, which then had no docks fit for taking in or repairing a ship of her size. On survey, she appeared much damaged, and, as the agents of the assured there conceived it to be impossible to remove her to any other port for repairs, they had her resurveyed, condemned, and broken up where she lay, as the best course for all concerned. No notice of abandonment having been given, it was held that the assured could not recover as for a total loss. Dallas, C. J., after admitting that there were cases in which the assured may claim a total loss without abandonment, added, '*But, if the case be doubtful, the assured ought not to take upon himself to determine for the underwriters*, to break up the ship and call *upon them for
*852] a total loss. The ship is proved to have been in that condition that it was necessary to have a survey. *She was not a wreck: her timbers were together; she existed as a ship specifically, both when she was surveyed and when she was sold.*' Mr. Phillips, remarking on this case (Vol. 2, p. 234), observes, 'The formal abandonment of a ship that has been broken up, and the pieces sold as mere materials or fuel, seems about as idle ceremony as can be well conceived.' But the decision seems correct in principle, when the circumstances of the case are attended to: *the ship remained a ship till broken up by the assured:* her destruction as a ship was, therefore, not immediately caused by the perils insured against; it was the work, not of the winds and waves, but of the assured himself, who ought, by notice of abandonment, to have given the underwriters the option of taking to the ship as she stood before being broken up, and making what they could of her."

At p. 1046, the learned author says: "*It must very carefully be borne in mind that no degree of loss in bulk, deterioration in quality, or depreciation in value, will entitle the assured to put an end to the adventure, and recover a total loss, without notice of abandonment, on goods warranted free of average, unless such damage involves their total destruction in specie, either actual or inevitable.* If the commodity can be forwarded to its port of destination, with any reasonable prospect of arriving there *in specie, however damaged*, the assured who has failed to send it on, or sold it at an intermediate port, cannot recover as for a total loss, at all events without notice of abandonment:"—and he refers to Anderson *v.* The Royal Exchange Assurance Company, 7 East 58. If that be a correct exposition of the rule,—and there seems no reason to doubt

it,—there is no ground for saying that the timber here was totally lost. Although the vessel *might have been totally lost, the timber still existed in specie, and might have been sent on at a cost [*853 less than its value, and, if so, it was the duty of the master to send it on, and the expense incurred in so doing would be an average loss. The assured are entitled to expenses actually incurred, not to contingent expenses: see Stuart *v.* Steele, 5 Scott N. R. 927; The Great Indian Peninsula Railway Company *v.* Saunders, 1 Best & Smith 41 (E. C. L. R. vol. 107) (in error), 2 Best & Smith 266 (E. C. L. R. vol. 110), cited in Booth *v.* Gair, 15 C. B. N. S. 296 (E. C. L. R. vol. 109).

Cur. adv. vult.

MONTAGUE, SMITH, J., now delivered the judgment of the majority of the Court,(*a*) as follows:—

This action was on a policy on timber in the ship Avon, from Quebec to Liverpool. The Avon was frozen up in her passage down the St. Lawrence; and, after survey, the ship and the cargo were sold by the master to one purchaser, by separate sales.

At the trial, the jury found in effect,—first, that the sale of the ship was justified on the ground that the cost of the repairs would have been greater than the value of the ship when repaired,—and, secondly, that it was right to sell the cargo, because it was not practically possible in a mercantile sense to have carried it to its destination, that is to say, because the cost of bringing the cargo, added to the amount of depreciation, would not have left any appreciable margin of profit to the owners.

Upon these findings, the verdict was entered for the plaintiffs for a total loss: and the rule nisi to alter that verdict, and enter it for a partial loss, on the ground that there was no evidence on which the finding of the total loss could be supported, is now to be disposed of.

*Upon the first question, relating to the ship, we have to say whether there was evidence to support the finding that the sale [*854 was justifiable: and our answer is in the affirmative.

We do not propose to state the evidence at length: but taking the report of the surveyors on the 2d of May, and the statement of Julien, who purchased on the 7th of May, we think there was evidence for the jury that the ship was in imminent danger of destruction, and that a sale appeared to afford the only reasonable hope of saving any part of her value.

Then, upon the second question, relating to the cargo, we have to say whether there was evidence to support the finding that it was right to sell it, because the cost of bringing the whole or any part of it to its destination would have exceeded the value thereof there: and our answer is again in the affirmative.

We are not called on to say on which side in our opinion the balance of evidence inclines. If there was reasonable evidence for the jury, the verdict is to stand: and we think there was.

We have been embarrassed with the estimate appended in sequel to the Judge's notes, by which it appears that a comparison of the supposed cost of carrying the timber to its destination with the supposed value thereof there, showed a possible profit of 209*l.* That estimate, taken alone, seems at first sight inconsistent with the finding in respect

(*a*) The case was argued before Erle, C. J., Byles, J., Keating, J., and Montague Smith, J.

of the cargo: but, as this estimate is followed by the note that the jury might say if anything is to be deducted for loss of quantity, we consider that there was evidence to the effect, that, in the process of saving the timber, there would probably be a loss of 25 per cent. in quantity; and, although it might follow, that, in the case of a diminution of the quantity of timber, a deduction should be made from some
*855] of the estimated expenses, *such as freight, in the like proportion, yet some of the expenses might be a constant quantity, subject to no deduction, such as the expense of bringing labourers to make rafts. All this was for the jury: and we cannot say that there was not evidence to support the verdict.

Then, upon the facts so found by the jury, is the plaintiff entitled to recover for a total loss? As the cost of carrying the cargo to its destination would have been greater than its value on arrival, it is not disputed that there would have been a constructive total loss, if notice of abandonment had been given: see Rosetto v. Gurney, 11 C. B. 176 (E. C. L. R. vol. 73); Reimer v. Ringrose, 6 Exch. 263.† But no such notice was given; and we are therefore to say what is the legal effect of this sale so found by the jury to have been right and necessary. We answer that such sale supervening on the existing state of things was an actual total loss. A right sale passes the property; and, when the property is passed from the assured by reason and in consequence of a peril insured against, the cargo is actually lost to him, as much as if it was destroyed. We are aware that the interest of the underwriter may at times be sacrificed by a sale where the ship or the cargo might have been saved wholly or partially if notice of abandonment had been given. But we are also aware, that if a right sale, such as was here proved, is not held to be an actual total loss, it would be for the interest of the assured, where a notice of abandonment would make a constructive total loss, to give a notice of abandonment, and leave the ship or cargo to perish unsold, and so the benefit of salvage from a sale would be lost by reason of the delay required for notice of abandonment. It must rest with the tribunal that has to deal with the questions of fact to guard against fraud and
*856] wrong: and the sale by the master ought not to be *found right or valid, unless it was the best that could be done for the interest of those concerned, with reference to all the circumstances, including the time and manner of sale, and so in a mercantile sense necessary.

The opposing considerations for and against requiring notice of abandonment where the property insured exists in specie, are stated in Roux v. Salvador, 3 N. C. 266 (E. C. L. R. vol. 32), 4 Scott 1, and Knight v. Faith, 15 Q. B. 649, 657 (E. C. L. R. vol. 69). In Roux v. Salvador, the policy was on hides from Valparaiso to Bourdeaux. The ship was forced into Rio, and decomposition of the hides began by reason of a peril of the sea; and, because it was found not to be practicable to carry them to their destination, on account of the expected progress of decomposition, they were sold at Rio; and the loss was held to be total, although there was no notice of abandonment. The judgment is that of a Court of error. It is powerful in reasoning and in learning: and, although it relates to a cargo of perishable goods in the course of decomposition, yet it extends to all

cases where the adventure is brought to an end by a peril, and the goods are taken out of the power of the assured in the course of their voyage either by physical laws working decomposition, or by political laws working detention and sale by a Court, or by circumstances of distress and danger creating what may be described as a mercantile necessity for a sale.

The present case is an example of such circumstances where a stranded ship was in danger of falling to pieces, and the expense and risk of rafting the timber and reloading it on transhipment, and carrying it to its destination, was supposed to exceed the value of the cargo when there. Such a case seems expressly included in the part of the judgment in Roux *v.* Salvador, 3 N. C. p. 279 (E. C. L. R. vol. 32), where it is said, that, "If goods *damaged by the perils of the sea, and necessarily landed before the termination of the voyage, [*857 are, in the case of perishable goods, in such a state that they cannot in safety be reshipped; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they *can* never be brought to their original destination,—in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance: the loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or other insuperable necessity."

The judgment in Knight *v.* Faith, 15 Q. B. 657 (E. C. L. R. vol. 69), accords with Roux *v.* Salvador in holding that there may be a total loss, without abandonment, when there has been a right sale caused by urgent necessity, with full proof that everything was done optimâ fide and for the real benefit of all concerned.

There is an apparent difference of opinion in these two decisions as to the degree of imminent danger which should be held to be such urgent necessity as would justify a sale. But the sufficiency of the degree of danger is within the province of the jury; and it is useless to attempt to define a degree without a standard for measure. Lord Campbell observes on the danger of fraud; but those observations are relevant to the caution required from the jury, not to the law of the case, when the necessity for the sale has been properly found. In King *v.* Walker, 33 Law J., Exch. 327, it was not necessary to decide that a valid sale from necessity was an actual total loss, without any notice of abandonment, because it was there held that there *was* notice of abandonment. But the Court clearly sanctioned the rational principles respecting *the effect of a valid sale from necessity laid [*858 down in Roux *v.* Salvador, saying, "it may not be easy to understand why notice of abandonment should be required in a case where the vessel cannot be made to sail except at an expense for repair which no reasonable man would incur, and is therefore properly, and in a sense necessarily, sold for the old materials."

In these three cases, all the authorities relating to abandonment are fully reviewed; and no useful object would be gained in repeating the review. We consider that we act upon the principles laid down in Roux *v.* Salvador, in holding that the jury finding, that the sale was right under the circumstances in evidence before them, found that there was an actual total loss, with benefit of salvage although

the cargo existed in specie at the time of the sale, and there was no notice of abandonment.

The above is the judgment of the Chief Justice and my Brother Keating and myself. My Brother Byles assents to it, subject to the remarks upon the preliminary point, which I am about to read.

BYLES, J.—I agree with my Lord and the rest of the Court, that, if the cargo had been sold by the captain of the vessel, because the expense of forwarding it to its destination would have *exceeded* its value when so forwarded, it was rightly sold, that a sale under such circumstances would have changed the property, and that there would then have been not merely a *constructive* but an *actual* total loss of the timber. I also agree, that, in the case of such an *actual* total loss, no notice of abandonment is necessary. But, in all cases of alleged constructive loss, where the captain takes upon himself to sell the ship, and still more so where he sells the cargo, the necessity of so doing ought to be strictly proved, and the jury are not at liberty to act on conjecture.

*859] *It is plain, on the figures appended to the report of the learned Judge, that the expenses of bringing the cargo to Liverpool would not have equalled the value of the cargo, when brought there in its integrity, by the sum of 209*l.* The jury have found that there would have been a diminution of the *quantity* of the timber to this extent, and therefore that the expenses would have equalled the value of the diminished cargo which alone could have been actually brought home. But I can find no evidence on the Judge's notes to support this amount of deduction from the original quantity of the cargo. It may be that there would be some deduction, but it may also be, that, if any, there would be a very much smaller deduction.

Again, on the assumption that such a diminution of quantity was proved, the expenses of bringing home the cargo should be calculated on the diminished quantity: but they are all calculated on the larger quantity of timber contained in the whole original cargo. It is possible (but I see no evidence to prove it) that the expenses of landing and rafting would be the same, whether any portion of the cargo were lost or not. This might depend on the period at which the loss of quantity took place, of which there is no evidence that I am aware of. But, assuming the landing and rafting to be constant quantities, yet the freight both original and additional is at so much per load, and is calculated by the assured on the quantity contained in the entire cargo. But the freight actually payable for sending a smaller quantity would be less. Therefore, in calculating the expense of sending the diminished cargo home, too much is charged for freight. But any deduction from the charge for freight makes the sale unlawful, and indeed destroys the claim for a constructive total loss: for, it does

*860] not appear on the figures, that, even if the freight could be *charged on the original quantity, it would do more than bring the expenses of sending home the cargo up to the value of the cargo so sent home: no excess of charge beyond the value of the cargo is shown.

I much regret, that, on this preliminary question, I am unable to

concur with the rest of the Court. But, though I fear I must be in error, I do not feel at liberty to yield my opinion; for, if it be correct, the plaintiff will still be entitled to hold his verdict to the extent of a partial loss, the amount of which loss is by agreement to be settled by competent parties. And, on a careful consideration of the evidence, I feel strongly that this result would be more likely to advance the real justice of the case than the verdict as it now stands.

Rule discharged.(a)

(a) An appeal is pending, which will in all probability be heard at the sittings in error after Michaelmas Term next.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

ELIZABETH J. JELLICOE, Appellant; Sir JOHN B. W. SMYTHE GARDINER, Respondent. *Feb.* 24, *March* 14, 1865.(*a*)

A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate of C. H., and having succeeded to the G. estate, made a will by which he devised his original estate C. H. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that as often as such estate of A. should come to the possession of any of his (B.'s) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (B.'s) will, should be entitled to the C. H. estate; and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estate had died, or was then dead, without issue:"

Held, that "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluding them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder.

In December, 1861, the respondent brought an action of ejectment against the appellant, to recover possession of an estate called the Clerk Hill Estate, situate at Whalley, near Blackburn, in the county of Lancaster, which he claimed under the wills of Sir William Gardiner and of Sir James Gardiner. The cause was tried before Mr. Justice Mellor, at the Liverpool Spring Assizes, in 1862, when a verdict was found for the defendant, but leave to move was reserved. A rule having been obtained, the facts were turned into a case.

Sir James Whalley Smythe Gardiner, called "the Testator," and also called Sir James Gardiner No. 1, had been, up to 1797, James Whalley, of Clerk Hill, Esq. At that time he succeeded to the possession of the Gardiner Estates and to the baronetcy. He was twice married; in 1784, to Elizabeth Assheton (who died in 1785), and again, in 1789, to Jane Master. By his first wife he had one son, who became Sir James Gardiner No. 2. By his second marriage he had four sons, Robert, William, John Master, and Thomas (the last died

(*a*) 11 H. L. Ca. 823.

in infancy), and several daughters, of whom the appellant was the eldest.

By the will of Sir William Gardiner, of Roche Court, in the county of Southampton, Sir James No. 1 held the Gardiner estates. That will was made in 1778, and gave the Gardiner estates to certain trustees, to the use of the heirs of the body of Sir William, and, in default, to John Whalley (afterwards Sir John Whalley Gardiner, the elder brother and predecessor of Sir James No. 1) for life; remainder to his first and other sons in tail male, subject to a proviso, shifting the estate in case the said John Whalley, or any of his sons, should become entitled, for life or in tail, to certain lands devised by the will of one Bernard Brocas; remainder to the use of James Whalley Gardiner (afterwards Sir James No. 1); remainder to the use of the first and other sons of James; remainder to the use of his younger brother Thomas William and his sons in tail male; remainder, in a similar order of succession, to the first and other daughters of John, James, and Thomas William in tail male; remainder to the use of the right heirs of John Whalley. Sir William died in 1779, and John Whalley entered into possession of the title and estates. He died in 1797, without issue, on which James Whalley, in like manner, succeeded to the Gardiner title and estates. On the 2d of July, 1796, this Sir James (the testator) executed a will by which he devised Clerk Hill estates to trustees in trust to settle and convey to his eldest son, James Whalley, for life, without impeachment, &c.; remainder to trustees, to preserve (this remainder was regularly repeated throughout the will) remainder to the first, second, third, fourth, fifth, and all and every other son of the body of the said James Whalley successively in tail male; remainder, in like manner, to his second son, Robert Whalley, and his sons; remainder in the testator's third son, John Master Whalley, and his sons; remainder, in like manner, to all the other sons of the testator hereafter to be born severally and successively; remainder to the sons of James, Robert, and John Master Whalley in like succession in tail general, "with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of my eldest son James Whalley, severally and successively in tail male;" remainder to the daughters of Robert Whalley and John Master Whalley; remainder to the daughters of these sons in tail general; "remainder to the use of Elizabeth Jane, my eldest daughter, and her assigns for and during the term of her natural life without impeachment," &c. This Elizabeth Jane is now Mrs. Jellicoe, the appellant.

After some other provisions came a shifting clause which recited the will of Sir William Gardiner, and declared the testator's desire, that "my said estates hereinbefore directed to be settled and conveyed shall not be held or enjoyed so long as I may legally prevent them, consistent with the limitation hereinbefore mentioned, &c., by any one of my sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, shall come into possession of the estates, &c., limited by the will of Sir William Gardiner; but as often as the estates, &c., limited by the will of Sir William Gardiner shall come to the possession of any of my said sons or daughters, or any of their issue, that then the person next in remainder, according to the limitations, &c., to my said estate, &c., after the person who shall so come

to the possession of the lands, &c., so as aforesaid limited and devised by Sir William Gardiner, shall be entitled to and come to the possession of my said estates, &c., for the estate and interest hereinbefore limited to him or her respectively; and so from time to time, as often as the event now in my contemplation may happen, in such manner and as if the person or persons so becoming possessed of the estate, &c., devised by the will of Sir William Gardiner had died, or was then dead, without issue. And the uses for which my said estates are directed to be conveyed shall accordingly cease, determine, and shift, from time to time, so as that the two several estates, the one formerly belonging to Sir William, &c., and the other now belonging to me, may never, so long as I may legally prevent the same, consistent with the limitations hereinbefore mentioned in other respects, and before the ultimate remainder or reversion hereinbefore directed, &c., be holden or enjoyed in possession, by any of my sons or daughters, or his, her, or their issue, together and at the same time, but, on the contrary, in manner and form hereinabove mentioned."

This Sir James Gardiner (No. 1) died in 1805, and his eldest son Sir James Gardiner (No. 2), entered into possession of the Gardiner estates. He did nothing to affect the entail.

Robert Whalley, the eldest son of Sir James No. 1 by his second marriage, entered into possession of the Clerk Hill estate. On coming of age he filed a bill against his half-brother, Sir James No. 2, against James the eldest son, then an infant, and all other necessary parties, praying that it might be declared that he was entitled to an immediate estate for life in the Clerk Hill estate, with remainder to his first and other sons in tail male, and that the trustees named for that purpose in the will of Sir James Gardiner No. 1 might convey accordingly.

On the 24th of May, 1813, Sir W. Grant, the Master of the Rolls, made a decree in accordance with the prayer of the bill, and the required conveyance was executed under the direction of the Court of Chancery. Robert was made to take the legal estate for life, with remainder to his sons in tail male, with remainder over in the line according to the will.

In March, 1814, the present respondent, the second son of Sir James No. 2, was born, and succeeded to the Gardiner estates and to the baronetcy on the death of his father, which happened on the 22d of October, 1851, his elder brother James having died in 1837, during the lifetime of their father.

Robert Whalley, William Whalley, and John Master Whalley, successively entered into possession of the Clerk Hill estates, and died without doing anything to bar the entail, and without ever having had issue. The last named died 27th October, 1861, and Mrs. Jellicoe then entered into possession.

Sir John John B. Whalley Smythe Gardiner, the present baronet, brought ejectment against her, contending that on the true construction of the will of Sir James, the testator, he was entitled to the Clerk Hill estates.

On the argument of the case in the Court of Common Pleas on the 12th of July, 1862, the rule for entering a verdict for the plaintiff was, by a majority of the Judges, made absolute (12 C. B. N. S. 568 (E. C. L. R. vol. 104)). This decision was afterwards unanimously affirmed

in error in the Exchequer Chamber in July, 1863 (15 C. B. N. S. 170 (E. C. L. R. vol. 109)). The present appeal was then brought.

Sir *H. Cairns* and Mr. *Manisty* (Mr. *Udall* was with them), for the appellant.—The intention of the shifting clause will be defeated if the respondent should be declared entitled to the possession of the Clerk Hill estates. The object of the testator was to prevent them and the Gardiner estates from going in the same line. When they were to come to the same person, that person being a *stirps*, he and his issue were to be struck out of the will, in the same way and to the same extent, as if he was then dead and had died without issue. The latter part of the expression shows that the issue as well as the *stirps* were to be excluded. The will was to be read as if there had not been any limitation to that person and his issue, until the happening of the ultimate limitation, when, of course, there being no farther reason for keeping the estates divided, any one person who was entitled in ultimate remainder might take both. The case of Carr *v.* The Earl of Errol, 6 East 58, 75, is in point here, and it was misapprehended by the Lord Chief Justice of the Common Pleas, when he supposed that the will there "contained clear words rendering the issue of the tenant for life incapable of taking the devised estate after it should have shifted from the tenant for life under the clause in that will." The clause is almost in terms like the proviso here. Doe *v.* Heneage, 6 T. R. 13, is not in point.

It was also contended that the title of the defendant in error, if ever it arose at all, arose in 1837, on the death of the elder brother James, more than twenty years before the commencement of the suit, and was consequently barred by the Statute of Limitations; and farther, that the deed of 1814 had not converted any of the executory trusts created by the will of Sir James No. 1 into legal estates, except those created in favour of Robert Whalley and his sons in tail male: and consequently that the claim of the respondent was one which could not be enforced in a Court of law.

The *Attorney-General* (Sir *R. Palmer*) and Mr. *Mellish* (Mr. *Quain* was with them), for the respondent, were not called on.

The LORD CHANCELLOR (Lord WESTBURY).—My Lords, at the date of the will of Sir James Gardiner the testator, the Gardiner estates stood limited under the will of Sir William Gardiner to Sir John Whalley Smythe Gardiner for life; remainder to his first and other sons in tail male; remainder to the use of Sir James, the testator, for life; remainder to his first and other sons in tail male; remainder to the use of the first and other daughters of Sir John in tail male; remainder over. Under these limitations no female issue of any son of Sir James could take or inherit.

By the will of Sir James Gardiner, the testator, the Clerk Hill estates were devised to trustees in fee upon trust, to convey the same to the use of the testator's eldest son, James, for life; remainder to trustees, to preserve contingent remainder; remainder to the first and other sons of James in tail male; remainder to the testator's second son Robert for life; remainder to trustees to preserve contingent remainder; remainder to the first and other sons of Robert in tail male; remainder to the testator's third son, John Master Whalley, for life; remainder to trustees to preserve; remainder to his first and other

sons in tail male; remainder to every other son of the testator successively in tail male; remainder to the first and other sons of the testator's eldest son James in tail general; with similar remainders in tail general to the first and other sons of the second, third, and every other son of the testator in tail general; with remainder to the first and other daughters of the testator's first and every other son in tail male; with remainder to the use of Elizabeth Jane, the testator's eldest daughter, for life, with divers remainders over. This Elizabeth Jane is the present appellant.

Pausing for a moment, and contrasting the limitation of these two wills, it is apparent, First, that if James, the eldest son of Sir James the testator, had daughters and no son, such daughters would not take under the limitations of the Gardiner estate, but would take the Clerk Hill estates severally and successively in tail male in remainder, anterior to the limitation to the appellant for life. Secondly, it is apparent that if the eldest son of the testator's first son James did not bar the entail, and died leaving daughters only, such daughters would take nothing under the limitations of the Gardiner estates, but would inherit under the limitation in remainder of the Clerk Hill estates to their father in tail general.

We now come to the shifting clause contained in the will of Sir James. By that clause the testator Sir James declares his will and mind to be, that his devised estates should not be held or enjoyed by any one of his sons or daughters, and his, her, or their issue, after such son or daughter, or such his, her, or their issue, should have come into possession of the estates devised by the will of Sir William Gardiner; but that as often as the estates devised by the will of Sir William should come to the possession of any of his (Sir James's) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (Sir James's) will, should be entitled to his devised estates for the estate thereby limited to him or her, and so from time to time as often as the event might happen, in such manner, and as if the person so becoming possessed of the Gardiner estate had died, or was then dead, without issue.

It is plain, from the first part of this clause, that the word "issue" denotes and is limited to such issue as might take or inherit under the limitations of the Gardiner estates, which would not include the daughters of Sir James's first son, or the female issue of a grandson. It is reasonable to put the same meaning upon the word "issue" in the subsequent phrase, "had died, or was then dead, without issue;" for the testator plainly contemplates that the Gardiner estates would be the supervenient estate, and that the shifting clause would be called into operation by the Gardiner estate accruing under the will of Sir William Gardiner, to some person taking the Clerk Hill estate under his own will. And as the guiding intent and object are to prevent unity of possession, the word "issue" ought not to be extended so as to include issue not capable of taking or inheriting under the limitations of Sir William Gardiner's will. But farther: it is the object of the clause to propel the Clerk Hill estates from the devisee who shall succeed to the Gardiner estates, to the person next in remainder, under the limitations of the Clerk Hill estates; and the words, as if such devisee "had died, or was then dead, without issue," are used

for this purpose, and denote the assumption or hypothesis necessary for effecting it. But it would be unreasonable to give the words a meaning beyond what is necessary for the intent and object with which they are used. So limited, they denote such issue as would take under the limitations anterior to the devise to "the person next in remainder," and exclude them only from taking under those limitations.

I agree with one of the learned Judges in the Court below, that but for Sir William Grant's decree, the words "had died, or was then dead, without issue," ought to be read as applicable distributively to the case of tenant for life and tenant in tail. But that construction is negatived by the decree, inasmuch as the son of Sir James No. 2 was made a party to the suit for the purpose of contending that by reason of his father having succeeded to the Gardiner estates, the Clerk Hill estate was propelled to himself as next in remainder. But it seems to have been decided, and apparently on the words "was then dead without issue," that the case must be treated as if Sir James No. 2 had died without leaving any issue inheritable under the limitation to his first and other sons in tail male; and therefore the words, "was then dead without issue," were held to apply to the case of a tenant for life of the Clerk Hill estates becoming entitled to the Gardiner estates. Accordingly, the decree declares Robert (being the second son of the testator Sir James) to be entitled to have the Clerk Hill estates settled on himself for life, without impeachment of waste, save as in the will mentioned, with remainder to Robert's first and other sons in tail male, with such remainders over as are contained in the will of the testator Sir James with respect to the said estates; a declaration which expressly treats all the estates limited by the will of Sir James the testator, in remainder expectant on the estate of Robert, as valid and capable of taking effect; and therefore the estates in remainder limited by the will to the first and other sons of James No. 2 in tail general, and also the estates limited in remainder to the first and other daughters of Sir James No. 2 in tail male, are treated by the decree as still subsisting and capable of taking effect; which would not be the case if, under the shifting clause, Sir James No. 2 must be considered as having died without issue male or female.

The deed of release and settlement follows the decree, and converts the equitable life estate of Robert Whalley, and all other the estates limited by the will of Sir James the testator, in remainder therein, into legal estates. The point, therefore, now raised by the present appellant is inconsistent with this decree and with the deed of release, which was settled in the Master's Office under the direction of the Court. The consequences of holding that the words "was then dead without issue" have a larger signification than what is required to pass on the Clerk Hill estate to the next devisee in remainder, would be very unreasonable. Thus, according to such construction, if Sir James No. 2 had daughters only, such daughters, although not inheritable to the Gardiner estates, would be deprived of the power of taking the Clerk Hill estate under the express gift to the first and other daughters of Sir James No. 2 in tail male. And so also the first son of James No. 2 would be deprived of the estate given to him in remainder in tail general, by which his female issue would lose the

right to inherit the Clerk Hill estate, although they could never take the Gardiner estates under the limitations in the will of Sir William. Thus, express estates given by the will of Sir James the testator would be taken away and defeated by a construction, put on the elastic word "issue" in the shifting clause, not required for the object and proper operation of the clause, which ought not to be extended beyond its declared intent and purpose. I have examined with great care the learned and able judgment of Mr. Justice Williams; but I think the reasons for putting a limited meaning on the words "without issue" in the shifting clause predominate.

Two other objections were faintly urged by the appellant; one founded on the Statute of Limitations, and the other on an allegation that the respondent had not the legal estate. With respect to the Statute of Limitations, the argument is at variance with the decree of Sir William Grant, for it must be founded on the construction that, when the Clerk Hill estate passed from James No. 2 as tenant for life, it vested in his eldest son, James Whalley Smythe Gardiner, who died unmarried on the 11th of October, 1837, when the respondent's title accrued, being 20 years before the action of ejectment. But this is not in accordance with the true construction; for the respondent claims under the limitation in remainder to the first and other sons of Sir James No. 2 in tail general. And with respect to the other suggested difficulty, it seems clear that the whole of the legal estate was conveyed, by the trustees of Sir James the testator, to uses correspondent with the trust estates declared by his will of the Clerk Hill estates, in remainder expectant on the estate for life given to his second son, Robert.

I therefore humbly move your Lordships to affirm the judgment, and to dismiss the appeal with costs.

Lord CRANWORTH.—My Lords, The direction contained in the shifting clause is, that as often as the Gardiner estates should, by virtue of the will of Sir William, come to the possession of any of the testator's sons or daughters, or any of their issue, then the person next in remainder under the limitations of his will should take the Clerk Hill estate as if the person so succeeding to the Gardiner estates had died without issue. The testator speaks of the Gardiner estates devolving on any of his sons or daughters. This could not have happened, for those estates were devised only to sons in tail male; but the clause may be read as if sons and their issue had alone been mentioned.

The question is, what issue is contemplated by the testator under the words "had died without issue." I think, certainly, that issue which stood, under the limitations of the will, in order before the next remainder-man, and so would, but for the shifting clause, have prevented him from succeeding. There is no intention, expressed or implied, to alter the limitations, except so far as was necessary for preventing the two estates from coalescing under the limitations of the two wills. And when, therefore, the respondent became entitled to an estate tail under the limitations of the will, subsequent to that under which the remainder-man had taken by virtue of the shifting clause, there was nothing in the language of the will preventing him from taking the Clerk Hill estate, for he was not in possession of the

Gardiner estate,—at all events, was not in possession of it under the will of Sir William,—the possession of which was obviously the sole motive influencing the testator to direct that his own estates should go to younger branches of his family.

With respect to the question of the legal estate, I entertain no doubt whatever. The whole of the will, and all its limitations, are set out *in extenso*, by way of recital, in the conveyance executed under the authority of the Court of Chancery; and though no other uses are in express terms declared except those to Robert, the son, for life, and to his first and other sons in tail male, this was probably done merely to avoid unnecessary prolixity, the other uses being sufficiently indicated by the general expressions referring to them as previously set out.

I therefore concur with the Lord Chancellor in thinking that the judgment below ought to be affirmed.

Lord CHELMSFORD concurred.

Judgment affirmed, and appeal dismissed with costs.

Lords' Journal, 14th March, 1865.

The MERSEY DOCKS and HARBOUR BOARD TRUSTEES *v.* WILLIAM CAMERON and Others. *Feb.* 18, 19, 22, 23, *July* 7, 1864.

JONES and Others *v.* The MERSEY DOCKS and HARBOUR BOARD TRUSTEES. *June* 22, 1865.(*a*)

The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

The statute is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works.

Trustees who were constituted by Acts of Parliament, "The Mersey Docks Board," and were specially appointed to have the control of certain docks, &c., vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were therefore held liable to be rated as occupiers, though they occupied such docks, &c., only for the purposes of these Acts and derived no benefit from the occupation.

The King *v.* The Commissioners of the Salter's Load Sluice, 4 T. R. 730; and The King *v.* Liverpool, 7 B. & C. 61, overruled.

Recent Acts expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the control of the trustees, were to be liable to rates.

Per Lord Chelmsford: These Acts did not by implication declare that the other parts of the docks were not liable to rates.

IN each of these cases trustees constituting the "Mersey Docks and Harbour Board" had brought in the Court of Common Pleas an action of replevin, to try the question of their liability to a rate for the relief of the poor.

Jones and others were the churchwardens and overseers of the town and parish of Liverpool, and had levied a poors' rate assessed at 20,580*l.* 18*s.* 8*d.*, as the amount payable by the dock trustees in

(*a*) 11 H. L. Ca. 443.

respect of the dock estates within the parish of Liverpool. A special case was agreed on, which set forth, in substance, the following facts: The dock estates in the parish of Liverpool were, by different Acts of Parliament, vested in the mayor, aldermen, and common council of the borough of Liverpool, as trustees of the docks and harbour of that town. Part of these estates had been granted by the corporation, part sold by the corporation to the trustees, and part purchased by the trustees from private individuals. These Acts of Parliament were 22 in number, and extended from the 8th Anne to the 21st Vict., both inclusive. The case gave both parties leave to refer to them. The dock estates consist of docks, basins, &c., and the trustees are by several Acts of Parliament authorized to receive dock-rates and duties in respect of the accommodation of vessels in the docks. By the 20 & 21 Vict. c. clxii. (local and personal), "An Act for Consolidating the Docks at Liverpool and Birkenhead into one Estate, and for vesting the control and management of them in one Public Trust all the Docks and other real property situated at Liverpool," that were held by or in trust for the trustees of the Liverpool Docks, were vested in the plaintiffs, to whom the name of "The Mersey Dock and Harbour Board" was given, subject to all charges and liabilities affecting the same. The plaintiffs were to stand possessed of all the property, privileges, &c., "upon the trusts, and for the purposes for which such property, privileges, &c., were holden previously to the commencement of the Act." The rules with respect to the moneys received under the Act had for their object the convenience and safety of shipping frequenting the port of Liverpool, which general purpose had been expressly declared in all the Acts. The 59th section of this Act enacted that, "The board shall render to Parliament, as soon as may be after the 24th day of June in every year, an account of its receipts during the preceding year, and the manner in which the same have been applied."

The board was bound to apply all the moneys received in the manner and for the purposes provided by these various Acts, and the case stated that "no member of the board derives any private advantage or emolument whatsoever from the execution of the trusts of the dock estate." All the revenue derived from any of the property is carried to the account of the general dock estate, and is appropriated and applied as directed by the Acts.

By the 4 Vict. c. xxx., s. 52, the trustees were empowered to build warehouses on the quays of one of the docks (a power by the 11 Vict. c. xxx., s. 3, extended to all the dock quays), and by section 71 of the first-mentioned Act, and section 4 of the second-mentioned Act, such warehouses were expressly made subject to all parochial and other rates.(a) None of the warehouses built in pursuance of these Acts is included in the assessment, the subject of this proceeding.

The question for the opinion of the Court was, whether the Mersey

(a) In The King v. The Inhabitants of Liverpool, 7 Barn. & Cres. 61 (A. D.) 1827, the Court of King's Bench had held that the Liverpool Docks were not rateable to the relief of the poor, on the ground that the Acts for creating the docks had directed how the money received for their use should be applied, namely, in manufacturing the docks, and if there was any surplus, the dock dues were to be lowered accordingly, "and to no other purpose or use whatsoever."

Docks and Harbour Board Trustees were rateable to the relief of the poor in respect of property in the parish of Liverpool other than that included in the two last-mentioned Acts? The Court of Common Pleas in the case of Jones gave judgment in favour of the Mersey Dock Trustees, in conformity with the case of The King *v.* The Inhabitants of Liverpool (7 B. & C. 61).

In the case of Cameron, which related to a rate levied on the trustees in respect of property within the parish of Birkenhead, the question of liability to rate was likewise discussed, but another point was also raised, namely, whether an action of replevin was maintainable. The Court, on this second point, thought that there ought to be judgment for the defendants, on the ground that the plaintiffs ought to have appealed against the rate to the sessions, and ought not to have left it unappealed against, and then contested its enforcement by an action of replevin.(*a*) Appeals in the two cases were then brought. The Judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Williams, Mr. Justice Byles, Mr. Justice Blackburn, Mr. Justice Mellor, and Mr. Baron Pigott, attended.

Mr. *Bovill* and Mr. *Mellish* (Mr. *Crompton Hutton* was with them), for the overseers in support of the rate.—The simple question in this case is, what is the construction that ought to be put upon the statute 43 Eliz. c. 2? The decisions on it are numerous, and have not been very consistent. Exceptions to its provisions have been introduced, which it is submitted are not warranted on principle; and the object of these appeals is to obtain a definitive declaration of the principle on which that statute is to be construed.

The words of the statute are simple—they give no other test of liability to rate except occupancy. They direct the overseers "to raise by taxation of every inhabitant and of every occupier of lands, houses, &c., in the said parish," the money required. It has been supposed that the occupation thus rendered liable must be one beneficial to the occupier, and consequently that where a corporation occupied for what were deemed public purposes, and the members of the corporation received no individual benefit from such occupation, they were not rateable. That is an erroneous view of the intention of the statute. Tolls received from the use of a ferry were held not rateable, because the receiver of them was not an inhabitant of the parish: The King *v.* Nicholson, 12 East 330; though it was clear that he was an occupier of the land from the use of which as a landing-place the tolls were derived. Again, where there was no payment made for the use of the seats in a Quakers' meeting-house, it was held that no rate could be imposed on the trustees: The King *v.* Woodward, 5 T. R. 79. None of these cases adopted a true principle. The purpose for which the building in this last case was applied could have nothing to do with the matter, for in The King *v.* Agar, 14 East 256, though the building was equally one used for religious worship, the rate was held good on the ground that pew-rents were received by the trustees. And in The King *v.* Hurdis, 3 T. R. 497, there being an actual occupation, though the place occupied was a lodging in a battery by a gunner, who was removable at pleasure, the Court held that the fact of his being an occupier made him rateable.

(*a*) 30 L. J., Mag. Cas. 185, 194; 8 C. B. N. S. 114 (E. C. L. R. vol. 98).

The only case in which exemption from rateability can be claimed is that where the land is occupied by the Crown itself, or in the direct service of the Crown; and if the purpose of the occupation is to be taken into consideration at all, it can only be so where the purpose of the occupation is for the benefit, not of a portion of the public, but of the public at large; and this distinction is referred to and recognised in Adamson *v.* The Clyde Navigation Trustees, not reported; The Queen *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51); The Queen *v.* Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66); The Queen *v.* Harrogate, 15 Q. B. 1012 (E. C. L. R. vol. 69). An occupation of land in one parish for the benefit of the poor of another, renders the occupation rateable in the parish where the land lies: The Governors of the Poor of Bristol *v.* Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31). The idea that occupation for public purposes afforded a ground of exemption, took its rise from the marginal note in Salters' Load Sluice Case, 4 T. R. 730;(*a*) but the judgment there shows that, as the Commissioners were "mere trustees to superintend the execution of the Act," they could not be deemed occupiers, and as there was no occupation, there was no rateability. The note and the judgment do not agree together; but even on the ground stated in the judgment itself, it is submitted that the case cannot be supported. Trustees are occupiers, though they may not occupy for their own benefit. In The King *v.* The Trustees of the Weaver Navigation, 7 Barn. & Cres. 70 n. (E. C. L. R. vol. 14), the rate was only held bad (occupation in certain parishes being assumed to be established) because the surplus tolls were expressly appropriated by the Act to the repairing of the county roads and bridges, which were deemed to be purely public purposes.

The application, under the direction of a statute, of all the funds derivable from the occupation of a particular property to the maintenance of that property, for purposes which confer no individual benefit on the trustees, and which are therefore called, but wrongly called, public purposes, affords no ground for exemption from rateability: The Tyne Commissioners *v.* Chirton, 1 E. & E. 516 (E. C. L. R. vol. 102). There the Commissioners of the Tyne Docks were held rateable, the occupation there producing a benefit, not to the public generally, but only to a particular section of the public; and there being nothing in the Acts for creating the docks, which excluded any possible surplus obtained by the dock dues from the payment of the poor-rates. In the previous case of The Trustees of the Birkenhead Docks, 2 E. & B. 148 (E. C. L. R. vol. 75), it had been decided that though all sums received for dues were to be applied to the purposes of the Dock Act, still, as it did not appear that the dues were to be kept down so as to meet those purposes only, it could not be considered that the Legislature had disposed of all the dues to purposes other than the poor-rate, or that the poor-rate might not properly be paid before appropriating the money to those purposes. The tendency, therefore, of the later decisions has been to exclude claims

(*a*) The marginal note is, "By an Act of Parliament, the commissioners of a navigation were authorised to take certain tolls, the whole of which were directed to be applied to public purposes: Held, that the tolls were not rateable to the poor."

of exemption, unless where they are established by legislative authority.

The case of The King *v.* The Inhabitants of Liverpool, 7 Barn. & Cress. 61 (E. C. L. R. vol. 14), decided in 1827, is that which will be most relied on by the other side. There the trustees of the docks were held not to be rateable, because, not only were the dues, when received, directed by the Act to be applied in making and maintaining the docks, but they were to be lowered when possible, and no individual trustee had any beneficial occupation of the docks. It is submitted that that case cannot, even on the assumed doctrine of public purposes, be supported. That decision proceeded partly on words to be found in the Act 51 Geo. 3, c. cxliii., which specifically directed how the dock dues were to be applied, and which Lord Tenterden treated as equivalent to the words in the Salters' Load Sluice Case, "and to no other use or purpose whatsoever." But even if those words themselves had existed in that Act, they could not have justified the decision. They would mean that the dues were not to be applied to purposes other than those of maintaining the docks, but they would not exclude the payment of those charges which the general law of the land had fixed upon all property. The mistake was in supposing that they had this excluding effect.

In The Queen *v.* The Trustees of the River Lea, Justice of the Peace, vol. xix., p. 310, there were several Acts of Parliament. The first had stated the objects of the trust, and contained a clause expressly prohibiting the funds from being applied to any other object; and also a clause declaring that they were not to be liable to any tax, assessment, &c., whatever. While the latter words were unrepealed, the funds were of course exempt; but, when a subsequent Act repealed them, though the former words still continued, the tolls received were held liable to rate. It may now be considered as established, that nothing but an express legislative exemption from liability to rate can authorize that exemption: it certainly cannot be implied from words which merely direct that the funds shall only be applied to particular purposes, for that direction has nothing to do with the payment of legal charges to which the property is subject. In the Acts relating to these docks there is no such direct exemption, and, consequently, none can be claimed. It will be argued, that as some of the recent Acts affecting the docks have declared that the new buildings authorized by them to be erected shall be liable to be rated, it must be assumed that the Legislature recognised that they would not have been so liable but for such a declaration. There is no ground for such an argument. The declaration in these Acts simply prevented the possibility of any question arising as to the liability to rate of the warehouses then authorized to be erected, but had no effect on anything that had gone before; it left untouched the question as to what was the general law as to the old buildings. It is submitted that they were liable. The enactment in the Statute of Elizabeth is universal in its terms; no subsequent Act of Parliament has introduced an express exemption as to any property (however it may be occupied), and there being no such express exemption, none can be implied. One statute cannot repeal the provisions of another unless there is an express contradiction between them: Dwarris on

Statutes, pp. 473, 474; Middleton v. Crofts, 2 Atk. 650; Mahoney v. Wright, 10 Ir. Com. Law Rep., N. S. 420; The London and Blackwall Railway Company v. The Limehouse District, 3 Kay & Jo. 123.

The effect of holding these docks not to be rateable would be extensive and disastrous. For some years past the Legislature has taken matters of this kind out of the hands of joint-stock Companies, and placed them in those of public trustees. This has been so as to sanitary matters in towns, and with regard to gasworks, and to waterworks: Mayor of Liverpool v. Overseers of West Derby, 6 E. & B. 704 (E. C. L. R. vol. 88). Are all the extensive occupations of such trustees to be free from liability to poor's-rate? Such exemptions could never have been foreseen at the time of the Statute of Elizabeth, and have never been suggested by any provisions or even phrases in modern Acts of Parliament.

Sir *F. Kelly* and Mr. *Quain* (Mr. *Parker* was with them), for the Mersey Docks Trustees.—Upon the true construction of the Statute of Elizabeth, for the assessment of property in occupancy there must be a real occupancy; and that occupancy must be beneficial. If the occupancy is one for public purposes alone it is not within the Act. To be within the Act, it must be attended with some profit to the occupier. Where the object is purely one of charity, The King v. St. Luke's Hospital, 2 Burr. 1053, The King v. St. Bartholomew-the-less, 4 Burr. 2435, or for what may be termed religious purposes, unattended with profit of any kind to the occupier, it is not exempt from (for that is, in such a case, a misapplied term), but is not within the Statute of Elizabeth: so, where the occupation is as of public property, applicable to public purposes, that is, where the benefit is not confined to an individual locality, or limited to a small defined body of persons, but results to all who need to avail themselves of it, the property is not rateable. So the question stands upon principle; how does it stand upon authority?

The authorities, when properly considered, are not conflicting. The cases of the first class related to charitable purposes. When those purposes were universal they were not within the statute; when they benefited only a limited class of persons they were. Thus considered, The Queen v. Badcock, 6 Q. B. Rep. 787 (E. C. L. R. vol. 51), is really in favour of the dock trustees. That case may be treated as laying down this doctrine, that, where property is occupied by persons who are clothed with a public character, having public duties to discharge, and discharging them without a salary, and without the capacity to apply any portion of the property to their own use, or to any use except that provided for by the law, purposes from which the whole public may derive a benefit, such an occupation is not rateable. It was there made rateable only because the benefit was confined to a small definite body of persons, and not given to the public generally. The trust here comes within the general not the restricted description. Shelter is to be afforded to all vessels coming into or going out of the port of Liverpool. That is a great public purpose. It is true that some of the persons who receive this benefit may be appointed members to constitute the board which provides it; some being nominated by the Commissioners of the docks at Liverpool, or by the Liverpool Corporation, or by the Commissioners of Public Works, and the rest

by the ratepayers; but they are not thereby made occupiers for their own benefit; they are the agents of all the commercial men of the world. It is not, therefore, a benefit confined to a portion of the public, but is a benefit secured to the public at large, and has all the characteristics of a national matter. The mode of making the payments cannot affect the question: the money is, of course, received from those who use the docks, but is received for and applied to public purposes alone. If a joint-stock Company had built the docks, a profit on the outlay would have been required for the shareholders; the trade of the country must have been taxed to that extent. No such profit can be made here, and its amount, therefore, is so much saved to the general shipping of the world. This is a public gain, one which operates for the advantage of the whole community.

It is true that the words of the Statute of Elizabeth are general, but what were the circumstances of the times when that statute was passed? Everything was then in the hands of the Crown or of individuals; there were no public trustees appointed to execute works for the public advantage, and receiving no emolument therefrom for themselves. But there were cases in which individuals gave up their own property to charitable purposes: and in such cases the property so employed was held not rateable. In Earby's Case, 2 Bulstr. 354, it was held that the taxation for the poor must be on the occupier according to his visible estate when the tax was imposed. Dalton's Country Justice, tit. *Poor* 48, is to the same effect. The cases distinctly establish the rule that there may be an occupation which, if not beneficial to the person who occupies, his occupation being only for a public or a charitable purpose, he shall not be rateable. In The King *v.* St. Thomas' Southwark, 2 Str. 745, a preacher was rated as the occupier of the meeting-house where he preached: it was proved that he made no profit from his occupation, and he was held not to be rateable; rating him merely as occupier being held to be too uncertain. An Anonymous Case in 1727, 16 Vin. Abr., *Poor*, E. v., was even stronger; there a rated house had been converted into a conventicle, and was rated as before; the rate was quashed because no profit was made of it. The same rule was adopted in Robson *v.* Hyde, Cald. 310. Then came the cases of St. Luke's Hospital, 2 Burr. 1053, and The King *v.* St. Bartholomew's Hospital, 4 Burr. 2435, where not the governor, the servants, nor the poor who received the benefits of the hospital were held rateable; yet the governor at least was in the actual occupation of the property.

On the other hand, in The King *v.* Gardner, Cowp. 79, where Catherine Hall Cambridge was seised of property from which the corporation of that establishment did derive a profit, it was held rateable. But in The King *v.* Waldo, Cald. 358, the result was different; there the plaintiff was the owner of a house which he devoted to the education of poor girls; he put a person into the house to act as their instructress. As he made no profit from it he was held not rateable. The King *v.* Field, 5 T. R. 587, is to the same effect. Where profit is made from the occupation even of the property of the Crown, such occupation may be made the subject of a rate: Lord Bute *v.* Grindall, 1 T. R. 338, 2 H. Bl. 265; where the plaintiff was the ranger of Richmond Park, and was held liable to be rated in respect of his

occupation of the Crown property. But in Lord Amherst v. Lord Somers, 2 T. R. 372, the colonel of a regiment rented stables by order of the Crown for the use of the regiment, but did not put his own horses there; and he was held not to be rateable. There Mr. Justice Ashhurst said, that "neither the possessions of the Crown nor of the public are liable to be rated to the poor." That case occurred four years before the Salter's Load Sluice Case, and consequently it cannot be truly said that the marginal note in the latter case created the doctrine as to the non-liability of property used for the purposes of the public.

It was the fact of an actual occupation, and a fact, too, that the occupation was a profitable one, which explains the decision in The Governors of the Poor of Bristol v. Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31). The King v. Hurdis, 3 T. R. 497, did not decide any point of law, but proceeded on the actual finding of the sessions, which had not been impeached, that there was a beneficial occupation. In Eckersall v. Briggs, 4 T. R. 6, the distinction before referred to was again established; the owner of certain stables used by the colonel of a regiment for his men, was held to be rateable, but this was under the words of a particular Act of Parliament. The discussion in The King v. The Mayor of London, 4 T. R. 21, shows that what is supposed to have been established by the Taunton Market Case, The Queen v. Badcock, 6 Q. B. 787, namely, that it must be a general public purpose, and not one of a limited kind, was established long before then. What was the Salter's Load Sluice Case, 4 T. R. 730? The tolls there collected were ordered to be applied to public purposes; at that time it was thought that tolls were subject to rate, but there was held to be no such occupation in that case as to create liability to rate. Nor is there any such occupation here. And therefore it is that the liability to rate in this case is not to be sustained.

In The King v. Parrott, 5 T. R. 593, the occupier of a coal-mine was held rateable, though the mine was actually at that time worked at a loss, for it was a beneficial occupation, and might often be profitable, and such an occupation was declared to be the proper test of liability. But in Holford v. Copeland, 3 Bos. & Pul. 129, the chambers of a Master in Chancery were held not rateable, because he had not a beneficial occupation of them. The same rule has been applied with, of course, a different result, to apartments in barracks, where the occupation has not been that which an officer was compelled to have for the performance of his duty, but has been one of a beneficial kind: The King v. Terrott, 3 East 506. So the case of The King v. The Governor and Company of the New River, 1 Mau. & Sel. 503, was held to be one of beneficial occupation, on account of the profits derived therefrom, and the rate was good,

It has been asserted that the case of The King v. The Inhabitants of Liverpool in 1827, 7 B. & C. 61 (E. C. L. R. vol. 14), had created surprise in the profession, but that observation is hardly justifiable, for it is in exact accordance with, and was followed some time afterwards by the decision in The Queen v. The Mayor and Aldermen of Liverpool, 9 Ad. & E. 435 (E. C. L. R. vol. 36), where it was held that as the Municipal Corporation Act had, by section 92, appropriated all the corporate funds to purposes of a public nature, the rateability of

the corporation in respect of town and anchorage dues had ceased. And though Mr. Justice Crompton, in The Tyne Commissioners *v.* Chirton, 28 Law J. M. C. 131, 1 E. & E. 516, said that The King *v.* Liverpool had created surprise in the profession, he distinctly added that it had been adopted as law, and showed that in the Birkenhead Case, 2 E. & B. 148 (E. C. L. R. vol. 75), it was not controverted. The case of The Weaver Navigation Trustees, 7 B. & C. 70 n. (E. C. L. R. vol. 14), was another instance where property applied to public purposes was treated as not liable to be rated.

The present case is identical with that of the Salter's Load Sluice Case, 4 T. R. 730; there tolls were in question which were deemed rateable; but there was no beneficial occupation. There can be no doubt that for a very long period it has been well established, that property occupied for public purposes alone, and from the occupation of which no individual derives a profit, is not rateable. In The King *v.* Harrogate, 15 Q. B. 1012 (E. C. L. R. vol. 69), Lord Campbell, who was supposed to have brought this principle into doubt, never said anything in opposition to the Salter's Load Case, nor to the Liverpool Case of 1827, but actually confirmed them by saying, "You have to show that all the purposes to which the money was applied are public;" which was itself a recognition of the preceding cases, and of the principle, that if the purposes were public there was no rateability. In The Queen *v.* The Commissioners for Lighting Beverley, 6 Ad. & E. 645 (E. C. L. R. vol. 33), the Commissioners were held not to be beneficial occupiers of the gasworks, because all the profits were to be applied as the Act directed; in other words, to public purposes.

The Birkenhead Dock Case, 2 E. & B. 148 (E. C. L. R. vol. 75), cannot be supported. It rests entirely on the assumption that all occupation must be beneficial, and that the whole doctrine of public purposes arose from an error in the marginal note of the Salter's Load Sluice Case. In both respects that is wrong. If the Birkenhead Case cannot be supported, the two cases Trustees of the River Lea, 19 Just. of Peace 310, and Tyne Commissioners *v.* Chirton, which followed it, must fall with it. As to the Clyde Case (not reported), it depended on the words of a Scotch Act, and the Judges found that in fact the trustees of the navigation were owners of the property, and as such liable in the very words of the Act. But there the general doctrine of non-liability on account of public property could not be denied; and though in the Birkenhead Dock Case Lord Campbell had seemed to disregard that doctrine, he did not disregard it when he came to the case of buildings connected with the administration of justice: The Justices of Lancashire *v.* The Overseers of Stretford, E. B. & E. 225 (E. C. L. R. vol. 96), where buildings provided by the county justices for a police station, were held not rateable.

This is property held by trustees appointed under Acts of Parliament who are under an obligation to do certain acts which are essentially of a public nature. The trustees derive no profit from the occupation of this property; all the profits are applicable to universal public purposes, and consequently there is no liability to rate.

Mr. *Mellish* replied.

The Lord Chancellor (Lord Westbury) moved that the following questions be put to the Judges:—

1. Are the Mersey Docks and Harbour Board "occupiers" of the docks vested in them, within the true meaning of the word "occupier" in the statute of 43 Eliz.?

2. If they are occupiers within the statute, are they exempted from liability to be rated for relief of the poor by the operation or effect of the statutes 4 Vict. c. xxx., 9 & 10 Vict. c. cxix., 11 Vict. c. x., 18 & 19 Vict. c. clxxiv., and 21 & 22 Vict. c. xcii., or any of them, or by reason of the purposes for which they occupy the same, or on any other ground appearing in the special case?

3. Does the Act of 20 & 21 Vict. c. clxii. (the Act of 1857), impose upon the board a liability to poor-rate in respect of the docks' estate and property vested in the board, or any and what part thereof, by virtue of the 26 and 27th sections of the last-mentioned Act?

Lord Chief Baron Pollock, in the name of the Judges, requested time to consider these questions.

July 7. Mr. Justice BLACKBURN read the opinion of the majority of the Judges. He said:—My Lords, the opinion which, with your Lordships' permission, I am about to read, contains the joint answers to your Lordships' questions of the Lord Chief Baron, Mr. Justice Williams, Mr. Justice Mellor, Mr. Baron Pigott, and myself.

To the first question put to us by your Lordships in these causes, we answer, that in our opinion the trustees constituting the Mersey Docks and Harbour Board are occupiers of the docks in question, within the true meaning of that word as used in the statute of 43 Eliz. c. 2.

Our reasons for that opinion are as follows:—Statute 43 Eliz. c. 2, s. 1, requires the overseers of every parish to raise by "taxation of every inhabitant, parson, vicar, and other, and of every occupier of" various kinds of real property, and inter alia of "lands in the parish, in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish.

Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. It would appear, from the passages cited at your Lordships' bar from Dalton's Country Justice, that this was determined very shortly after the statute was passed. It has always been so held, and the Legislature, by the Parochial Assessment Act (6 & 7 Will. 4, c. 96), has affirmed this principle, by enacting that no rate shall be valid unless made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

In order, therefore, that a valid rate may be imposed, it is essential that the occupation should be of value beyond what is required to

maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act), would either give no rent, or a rent which, after deducting the average annual expense of the maintenance would leave no overplus, there is nothing to rate.

The question whether replevin lies has been waived, and therefore it is not necessary farther to consider whether in such a case the more proper expression would be that the person in possession of the property was not *an occupier at all* within the meaning of the Statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass; or whether, as seems to have been the opinion of the Court of Queen's Bench in The Overseers of Birmingham *v.* Shaw, 10 Q. B. Rep. 868 (E. C. L. R. vol. 59), and The Queen *v.* Bradshaw, 29 Law J., M. C. 176, he is *an occupier* whom, as such, the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing.

Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words "beneficial occupation" are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks. Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the trustees a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent.

Where there is an actual demise of property to an occupier who pays rent to the owners of the property, the tenant, if a subject, is rateable, without any regard to the purpose to which the rent is applied. It is immaterial whether the landlord enjoys the rent himself, or is obliged to pay it away as interest to mortgagees, or even (as is the case with the tenants of Crown property) pays it into the consolidated fund or the privy purse of the Sovereign. The occupier in each case is rateable. And if the matter were now for the first time to be determined without reference to decisions, it would seem that where the owners of the property are themselves in occupation and receive the value, the amount of which is measured by the rent which the hypothetical tenant would give, the purposes to which that amount is applied ought to be as immaterial as if there had been a real demise at that rent; and the occupiers, if subjects, ought to be rated, whatever be the object for which the property is occupied, unless some special enactment exempted them. But decisions have now settled that there is an exemption; and the important question

in the present case is, what is the nature of the occupation and of the purposes which bring the occupier's case within that exemption. And on this question the decisions are to some extent inconsistent, and it is necessary to examine them.

The Crown, not being named in the Statute of Elizabeth, is not bound by it: and consequently the overseers cannot impose a rate on the Sovereign in respect of lands occupied by Her Majesty, nor on those occupied by her servants for Her Majesty.

The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property: The Queen *v.* Lady E. Ponsonby, 3 Q. B. 14 (E. C. L. R. vol. 43). On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the Sovereign or her servants on her behalf, the occupation being that of Her Majesty no rate can be imposed: Lord Amherst *v.* Lord Somers, 2 T. R. 372.

So far the ground of exemption is perfectly intelligible, but it has been carried a good deal farther, and applied to many cases in which it can scarcely be said that the Sovereign or the servants of the Sovereign are in occupation. Long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police, and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the Post-Office, Smith *v.* Birmingham, 7 E. & B. 483 (E. C. L. R. vol. 90), the Horse Guards, Lord Amherst *v.* Lord Somers, or the Admiralty, The Queen *v.* Stewart, 8 E. & B. 360 (E. C. L. R. vol. 92), in all which cases the occupiers might strictly be called the servants of the Crown; but also to property occupied by local police. Justices of Lancashire *v.* Shelford, E. B. & E. 225 (E. C. L. R. vol. 96); to county buildings occupied for the assizes, and for the Judges' lodgings, Hodgson *v.* Local Board of Carlisle, 8 E. & B. 116 (E. C. L. R. vol. 92); or occupied as a County Court, The Queen *v.* Manchester, 3 E. & B. 336 (E. C. L. R. vol. 77); or for a jail, The Queen *v.* Shepherd, 1 Q. B. 170 (E. C. L. R. vol. 41).

In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the Sovereign, so as to make the occupation that of Her Majesty; but the purposes are all public purposes, of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*. And the decisions are uniform, and were not disputed at the bar, that the exemption applies so far; but there is a conflict between the decisions as to whether the exemption goes farther.

There are several cases relating to charities which were mentioned at your Lordships' bar, but were not much pressed, nor, as it seems to us, need they be considered now; for, whatever may be the law as

to the exemption of property occupied for charitable purposes, it is clear that the docks in question can come within no such exemption.

There is, however, one case on this subject, that of The King *v.* St. Luke's, 2 Burr. 1053, which it is necessary to notice on account of the effect which in The King *v.* The Commissioners of Salter's Load Sluice, 4 T. R. 730, was attributed by Lord Kenyon to part of what fell from Lord Mansfield in that case. In The King *v.* St. Luke's, the question before the Court was whether Joseph Mansfield was rateable as occupier of St. Luke's Hospital; but the Court entered into the larger question, whether there was any one who could be charged as occupier, saying very truly that unless there was some one who could be so charged, no rate could be imposed. Lord Mansfield as to that is reported to have said, "As to the lessees, mere nominal trustees cannot be esteemed occupiers, or rated as such." In the subsequent case of The King *v.* St. Bartholomew, 4 Burr. 2435, Lord Mansfield says that the Corporation of London "are not de facto the occupiers of St. Bartholomew's Hospital; the poor are the occupiers, but they are not rateable." This may perhaps show that Lord Mansfield only meant to lay down the position that those in whom the legal estate is vested are not necessarily the occupiers; which is no doubt true: no one could contend that the person in whom a term assigned to attend the inheritance had vested, could be rated as occupier, in point of law, of the estates de facto occupied by his cestui que trust. But if Lord Mansfield meant (as it rather seems that Lord Kenyon thought he did), that the persons in actual valuable occupation of property are not rateable if they occupy in a merely fiduciary character, it is a position which cannot be maintained. The counsel for the trustees of the Mersey Dock and Harbour Board, at your Lordships' bar, did not attempt to maintain any such general position; they limited themselves to contending that such was the law where it was a public trust, for which they cited authorities which they said must be overruled unless that position was maintained. And we think they were justified in so saying; but we also think that there are conflicting decisions which must be overruled if it is maintained.

The first case in which the position was advanced that trustees occupying valuable property, but prohibited from taking any individual benefit from it, were not rateable, seems to have been that of The King *v.* Mayor of London, 4 T. R. 21, decided in 1790. There Mr. Justice Buller in his judgment says, "Now, it has been objected that they are not liable to this rate, because they hold it on a public trust; but in the first place it does not appear to be the case of a trust at all; and if it did, perhaps the consequence contended for would not necessarily follow." It certainly seems that the doctrine contended for was not at that time, 1790, considered as established.

The King *v.* The Commissioners of Salter's Load Sluice, 4 T. R. 730, was decided in 1792. In the argument the clauses of the Act under which the Commissioners held were referred to, and argued on, but Lord Kenyon's judgment does not appear to have proceeded on the ground that their effect was to prohibit the payment of poor-rate. He says, "The trustees have a bare naked trust, not coupled with any interest. If any interest resulted either to the Commissioners or to the owners of the adjoining land after the public purposes of the

Act were answered, these tolls might have been rated. But it is admitted that all the money which is collected under this Act of Parliament must be expended for the purposes of the Act, and therefore, upon the ground upon which the Court proceeded in The King *v.* St. Luke's Hospital, namely, that there was no occupier, these Commissioners are not liable to be rated."

The counsel for the parish and township in the cases at your Lordships' bar did not attempt to deny that this decision was in favour of their opponents; they admitted (and we think quite properly admitted) that the decision was against them, but they denied that it was law. The counsel for the Mersey Board were fully justified in relying on this case, as entitling them to the benefit of Lord Kenyon's judgment; but we think that when they proceeded to argue that the decision acquired additional authority because it was acquiesced in, they fell into a fallacy. When the Court of Queen's Bench has decided in favour of a rate, those who are rated may, if they are so advised, bring replevin, and (subject to the question whether replevin lies in such case) may carry the case up to the House of Lords; and, therefore, where a decision in favour of a rate is not disputed farther, it may properly be said to be acquiesced in. But when the Court of Queen's Bench has decided against a rate, and quashed it, there is no way whatever in which the parish officers can raise the question again; and acquiescence in a decision cannot add any weight to it when there is no possible way of disputing it.

The next cases to be found in the reports in which any similar points arose were those of The King *v.* Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), and The King *v.* The Weaver Navigation, Id. 70 n., in 1827. It appears from the papers in the appendix to this special case, that in 1806 the Liverpool Sessions made an order excluding the Liverpool Docks from a rate for the relief of the poor of the parish of Liverpool, subject to a case intended to obtain the opinion of the King's Bench on the question whether the Mayor, &c., of Liverpool were rateable as occupiers of the docks; and that in 1808 the order of Sessions was confirmed, but under what circumstances does not appear.

The late Lord Abinger was counsel for the parish, both in that case and in the case of 1827; and the attorneys of the Corporation of Liverpool in 1827 could not be ignorant of the circumstances attending the confirmation of the order of Sessions in 1806. Yet on the argument in the case reported in 7 B. & C., neither side alludes to what, if a decision at all, must have been precisely in point. It seems, therefore, probable that, though the rule confirming the order in 1808 is not drawn up as by consent, the former case was compromised, and that there was no decision of the Court in 1808.

However this may be, there can be no doubt that the Court of King's Bench in 1827 acted upon the authority of The King *v.* Salter's Load Sluice, 4 T. R. 730, Lord Tenterden saying, "Here the trustees were not occupiers in the ordinary sense of the word, and no profit was received for the use of any person; and Mr. Justice Bayley saying, "The principle of this decision is applicable to the case of The King *v.* The Trustees of the River Weaver Navigation. There the surplus tolls remaining over and above the expenses of support-

ing the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes; and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees."

There is no dispute that those two decisions, if they are to be followed, are decisive in favour of the Trustees of the Mersey Docks, at least in the first of the cases at your Lordships' bar, and reduce the case of the Overseers of Birkenhead to that point mentioned in your Lordships' third question.

The next case to which it is necessary to call attention is that of The Governors of the Bristol Poor *v.* Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31), decided in 1836. In that case the Governors of the Bristol poor had taken property for the purpose of putting out their poor there. A rate had been imposed on them in respect of this occupation, and was levied by distress. The Governors of the Bristol poor brought replevin for the purpose of questioning the validity of this rate. In the judgment of the Court the point raised is said to be "whether the plaintiffs were such occupiers of the property as to be rateable to the poor." And the decision was that they were. The Judges who decided this case probably did not suppose that they were deciding anything inconsistent with the decisions in The King *v.* Salter's Load Sluice, and The King *v.* Liverpool, and The King *v.* Trustees of the Weaver Navigation, which appear not to have been cited on the argument, or brought to their notice. But we do not see how the cases can stand together. The Governors of the poor of Bristol were as much bare naked trustees having no personal interest in the occupation of this property as the Commissioners of Salter's Load Sluice, and if the one set of trustees were, on that ground, not occupiers, we do not see how the others could be occupiers; and if the application of the surplus funds of the Weaver Navigation to the bridges and highways of Cheshire, so as to be in relief of the county rate, was a public purpose rendering the trustees of that navigation not rateable, it is difficult to see why the application of whatever value was derived from the lands occupied by the Governors of the Bristol poor to the maintenance of the poor of Bristol, and so in relief of the poor-rate of the city of Bristol, was not a public purpose also. We think that in this case, the Court of King's Bench, probably without being aware of it, came to a decision inconsistent with, and, therefore, shaking the authority of the three cases, Salter's Load Sluice, Liverpool Inhabitants (1827), and the Weaver Navigation.

The decision in The Governors of Bristol Poor *v.* Wait has been repeatedly acted upon, and never questioned that we know of. As the decisions in that case and those which followed it, were decisions in favour of the rate, and, consequently, might have been questioned in replevin, the acquiescence in them does add something to their authority.

The Municipal Corporation Act (5 & 6 Will. 4, c. 76) restricted the power of the municipal corporations named in Schedules A. and B. to that Act, over what had been their private estates, and compelled them to pay the net proceeds into the borough fund, which was applicable first to the payment of the existing debts of the corpora-

tion, and then to the corporation expenses; and the surplus, if any, for the public benefit of the inhabitants and the improvement of the borough. The Court of Queen's Bench in The Queen *v.* The Mayor, &c., of Liverpool, 9 Ad. & E. 435 (E. C. L. R. vol. 36), decided in 1839 that the effect of this enactment was to render corporations no longer liable to be rated in respect of any property occupied by them. The reason given by the Judges for this decision was that they found "the principle settled by the decisions already made, and felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority." They proceed to state the cases of The King *v.* Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), and The King *v.* Trustees of Weaver Navigation, Id. 70 n., and say, "We feel it to be impossible substantially to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public in the one case is the same town of Liverpool, in the other the county of Chester." They do not explain why the same argument did not avail in The Governors of Bristol Poor *v.* Wait, where the city of Bristol was held *not* to be the public; but they did not intend to depart from that decision, and in the same year acted upon it in The Queen *v.* The Guardians of Wallingford, 10 Ad. & E. 259 (E. C. L. R. vol. 37), in which latter case an attempt, but, as it seems to us, not a successful one, is made to reconcile the decision with that in The Queen *v.* Mayor, &c., of Liverpool.

Mr. Justice Crompton, in The Tyne Commissioners *v.* Chirton, 1 E. & E. 516 (E. C. L. R. vol. 102), stated that the decision in The Queen *v.* The Inhabitants of Liverpool created at the time great surprise. We think, however, that the conclusion come to by the Court in that case does logically follow from the decisions in The King *v.* The Inhabitants of Liverpool, and The King *v.* Trustees of the Weaver Navigation, and that the Judges in that case had to choose whether they would consider it a reductio ad absurdum, and say that decisions leading to such a conclusion must be wrong in principle, or to say that, the decisions being binding on them, they must hold that the conclusion was not wrong. They adopted the latter course, apparently not at that time perceiving that it was inconsistent with the principle of their own decision in The Governors of the Bristol Poor *v.* Wait. A few years later the Court of Queen's Bench, in several cases to be presently cited, adopted the former course, and the question now pending in your Lordships' House seems to us to be in substance, which class of decisions is to be followed in future?

The effect of the decision in The Queen *v.* The Mayor, &c., of Liverpool was immediately nullified by the Act 4 & 5 Vict. c. 48; but that enactment did not declare the decision erroneous. On the contrary, the Act was couched in language which, though not declaring the decision to be law, indicates that the framers of the Act thought that it was law; and the fact that an Act couched in such terms was passed by the Legislature affords an argument, of more or less weight, that the error of the Court, if it was one, had been acquiesced in, and had become communis error.

This is, we think, the latest authority in point of date relied on by the counsel for the Mersey Docks and Harbour Board.

The next case in order of date was The Queen *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), in 1845. In the judgment of the Court, the conflicting cases are cited. The Court does not attempt to reconcile them, but observes that in all the cases where the occupation was held to be of such a public nature as to exempt the property from rateability, "the public, as such, unlimited by the bounds of county, borough, or parish, had a direct interest in the benefit which the application of the funds produced," and that the case then before it did not come within that principle. The passage here cited has been repeatedly quoted with approval as giving the true principle of exemption. It does include all the cases already cited, in which the occupation was for the purposes of government. But the principle thus laid down cannot be made to embrace either The King *v.* The Trustees of the Weaver Navigation, where the funds were applicable to the relief of the county rate of Cheshire, or The Queen *v.* The Mayor, &c., of Liverpool, where the funds were brought into the borough fund in relief of the borough rate in that particular borough.

In The Queen *v.* Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66), in 1849, the Court of Queen's Bench, acting upon the principle laid down in The Queen *v.* Badcock, held that the Commissioners of the Huddersfield Waterworks were rateable to the relief of the poor.

All the cases which we have hitherto cited were decided before Lord Campbell took his seat upon the bench. It is right to notice this, for it has often been supposed, and indeed was said in the argument at your Lordships' bar, that the decisions in his time, on the subject of the exemptions from rates, were innovations introduced in consequence of his strong individual opinion that the exemptions from rateability had been carried farther than was warranted by law or reason; but we think that the cases which we have cited show that, before he came upon the bench, that opinion had been entertained and acted upon, and that, in consequence, the decisions had got into such a state as to be inconsistent with each other; so that it had become necessary to overrule one set of these decisions, unless the law was to be administered without any reference to principle, deciding each case as it arose, according as the facts might be supposed to approximate more nearly to those in the one set of decisions or the other.

Several cases were decided in Lord Campbell's time which closely resembled that of the Huddersfield Commissioners (The Queen *v.* Longwood), and which were decided in the same way, without rendering it necessary to go farther than had been done in that case, until, in 1852, the case of The Overseers of Birkenhead *v.* Trustees of Birkenhead, 2 E. & B. 148 (E. C. L. R. vol. 75), arose. Mr. Justice Crompton was a party to that decision, and in The Tyne Improvement Commissioners *v.* Chirton, he has given some account of the deliberations on that case (though his observations were misunderstood by the reporter), and he repeated it during the argument, in the Exchequer Chamber, of this case. It appears that this learned Judge was at first startled at being called upon to act on a principle in direct opposition to the considered decision of the Court of Queen's Bench,

in The Queen v. Mayor, &c., of Liverpool, 9 Ad. & E. 435 (E. C. L. R. vol. 36), though he had always thought that decision wrong; and that he was the more unwilling to act in direct contradiction to that case, because the Legislature, in 4 & 5 Vict. c. 48, when enacting that the decision should no longer be practically operative, did not express any disapprobation of the principle of the decision, but rather used language seeming to assume that it was good law; and he doubted whether the case should not be followed, though not approved of, leaving it to the Legislature to correct it. The other Judges of the Court thought that the time had come when the Court could no longer halt between two sets of decisions, but must follow that which was law; and Mr. Justice Crompton ultimately agreed with them. Lord Campbell in his judgment (perhaps out of deference to the doubts which Mr. Justice Crompton had at first entertained) seeks to avoid expressly overruling the previous decisions; and suggests that perhaps The King v. The Commissioners of Salter's Load Sluice, and The King v. Inhabitants of Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), may be distinguishable on the ground that the private Acts in those cases were construed by the Courts as amounting to a prohibition to pay poor-rate. But the counsel on both sides at your Lordships' bar agreed that no such distinction could be maintained, and we think that neither Lord Kenyon nor the Court of King's Bench in Lord Tenterden's time proceeded on any such ground. And in the subsequent cases of The River Lea Navigation, 19 Just. of Peace 310, and The Tyne Improvement Commissioners v. Chirton, in 1859, no such distinction was made. The Court of Queen's Bench in that last case acted upon the broad principle that though, where the property was occupied for public purposes, "such as," says Lord Campbell, "a post-office, or a military store depot, where the purposes for which the property is occupied are purposes created by the government of the country," there was no rateable occupier, the occupation of a public dock was not an occupation for such public purposes, and that the Commissioners occupying such a dock were rateable in respect of the value of that occupation, estimated according to the rule laid down in the Parochial Assessment Act, unless an exemption was conferred by some subsequent statute; and that the enactments in the Tyne Improvement Acts as to the application of the rates received (which are in substance the same as those in the Liverpool Acts), did not amount to such an exemption; and Mr. Justice Crompton, after stating his former doubts when the Birkenhead Case was argued, said that he now thought that case laid down the proper rule. This, we think, must be considered as the rule now acted upon in practice in the Court of Queen's Bench.

Such being the state of the authorities, it seems to us no longer possible to support the decisions relied on by the counsel for the Mersey Docks and Harbour Board. We quite agree that it is very desirable to adhere to decided cases, though this principle may be carried too far. It has been forcibly remarked by an American author of repute,(a) that where the objection to the decisions "is inconsistency with admitted fundamental principles, it is an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a science to an aggregation of dogmas." Still the inconvenience

(a) Phillipps on Insurance 393, n. g.

caused by unsettling the law and disturbing what was quiet, is so great, that we agree that even a Court of error should be slow to reverse decisions which, though originally wrong, have long been uniform. When such is the case, it may often be proper to persevere in the error, and leave the remedy to the Legislature. It may be that the attention of the Judges of the King's Bench had in 1836 been called to the case of The King *v.* Liverpool, and The King *v.* Weaver Navigation, 7 B. & C. 61 & 70 n., (E. C. L. R. vol. 14), before they decided The Governors of the Bristol Poor *v.* Wait, this principle, which is strongly laid down in Crease *v.* Sawle, 2 Q. B. 862 (E. C. L. R. vol. 42), would have led them to decide The Governors of the Bristol Poor *v.* Wait otherwise than they did. But all this inconvenience has been already incurred, the recent decisions have been such as to disturb the quiet state of things, and a decision of your Lordships' House affirming the non-rateability of the Liverpool docks must reverse the decision in Tyne Commissioners *v.* Chirton, and render the docks in the Tyne not rateable. And such a decision, though not necessarily reversing the numerous decisions based on The Governors of the Bristol Poor *v.* Waite, by which poor-houses and gasworks and waterworks in the hands of public trustees have been held rateable, must greatly shake their authority and disturb a principle of rating now generally adopted throughout the country. The balance of convenience, if that be a legitimate consideration, is now in favour of adhering to the more recent decisions. And if we view the case on principle, without regard to the decisions either way, it seems to us clear that the Mersey Docks and Harbour Board ought to be rated.

The counsel referred to many expressions in the local Act showing that the Mersey Docks were thought likely to confer great public benefit, and to be very advantageous to the commerce of this country; and there is no doubt that that expectation has been realized, and that these docks are of great public benefit; but not more so than the docks in the river Thames, all of which are in the hands of private Companies, and are undoubtedly rateable.

The rate is to be withheld, not in respect of the value of the benefit conferred on the public, or on that portion of it which uses the dock, but is to be imposed on the occupiers of the docks in respect of the value to them derived from the payments taken for that use. And we think it impossible to point out any real distinction in this respect between the occupation of a dock formed by a Company under an Act of Parliament incorporating "The Companies Clauses Act," aud "The Harbours, Docks, and Piers Clauses Act, 1847," and the occupation of the Mersey Docks by the Mersey Docks and Harbour Board.

A Company forming docks under an Act of Parliament incorporating these Acts is bound to maintain the docks, and to keep harbour-masters and other officers there, and to allow the public to use the docks on payment of the rates, and to allow Her Majesty's vessels to use them without making any payment; and by these means they confer a benefit on the public; the Company by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to pay-

ing interest on the loans, the amount of which is limited, and then in paying dividends on the share capital; and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached, the rates must be lowered. It is indisputable that a Company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour-masters and others who manage it, we change the name of the body which occupies it from that of "*the Company*" to that of "*the Board*;" and if, instead of "*the Company*" paying to the shareholders a maximum dividend on their capital, the "*Board*" must pay to the same individuals the same identical sums, but call them "interest on bonds" instead of "maximum dividend on share capital," what difference does this make? If The King *v.* Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), is to be supported, it makes this difference, that what was formerly an occupation in respect of which the *Company* was rateable, has, by this change of name, without any change in the thing, become an occupation for public purposes, for which the *Board* is not rateable. If the decision in The Tyne Commissioners *v.* Chirton is to be supported, the change in name makes no difference in the rateability.

We think the latter the correct view of the law, and therefore we answer your Lordships' first question in the affirmative.

We now proceed to answer the second question put by your Lordships. And we are of opinion that there is nothing in the matters referred to in your Lordships' questions to exempt the Board from being rated in respect of this occupation.

We have already, in answering your Lordships' first question, given our reasons for thinking that the purposes to which the rates are applicable, are not such as to exempt the trustees from rateability; and we are further of opinion that the effect of the statutes applicable to the Liverpool Docks is not such as to exempt them from the payment of poor-rate. There are no negative words prohibiting the application of the rates to payment of the poor-rate. And we think, in conformity with the decision in The Tyne Commissioners *v.* Chirton, 1 E. & E. 516 (E. C. L. R. vol. 102), that enactments directing that the revenue shall be applied to certain purposes, and no others are directory only; and mean that after all charges imposed by law on the revenue have been discharged, the surplus or free revenue, which otherwise might have been disposed of at the pleasure of the recipients, shall be applied to these purposes.

We have only, therefore, to consider the reasons on which the Judges in the Court of Exchequer Chamber based their decision in the first of the present cases; and with very great respect for those who concurred in that judgment, we think that they acted on a principle sound in itself, but not applicable to the case before them.

Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act in pari materiâ uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before: and, unless there is something to rebut that presumption, the Act

should be so construed, even if the words were such that they might originally have been construed otherwise. And if the decision in The King *v.* The Inhabitants of Liverpool, had been that certain words used in the former Acts had amounted to an exemption from poor-rate, and those same words had been repeated in the subsequent Acts, it would, on this principle, have been a fair inference that the Legislature intended by using the same words to give the same exemption. But this is not the case here. The Legislature had by former Acts conveyed to the trustees the docks to be held for certain purposes. The Court of King's Bench had decided that, as an incident of law, those who held land for such purposes were not rateable to the relief of the poor. When the Legislature again in fresh Acts used the same language, it showed that it intended to convey the land to be occupied for the same purposes; and that if the law did annex non-rateability as an incident to such an occupation, the Legislature had no objection. But it did not afford any argument that the Legislature intended to annex that incident in case it should be discovered that it was not annexed by law. And the clauses enacting that the warehouses should be rated, carry this argument no farther.

During the course of the argument at your Lordships' bar, the Lord Chancellor put the case of an express recital in the Act, to the effect that it had been decided in The King *v.* The Inhabitants of Liverpool, that the dock trustees were not liable to poor-rate in respect of land occupied by them, and that it was expedient that no such exemption should be given to them in respect of the occupation of new warehouses acquired under the new Act, and then, after that recital, an enactment in the terms in which it is now expressed. And he asked the counsel at your Lordships' bar two questions. First, whether such a recital could be construed to amount to a declaratory enactment, that the decision in The King *v.* Liverpool was good law? Secondly, whether the Acts framed as they were, could have a greater effect than they would have had, if framed with such an express recital? The counsel for the Mersey trustees were not able to give any answer to those questions that would support the decision of the Court of Exchequer Chamber. Mr. Justice Blackburn (the only Judge who, being a party to the decision in the Exchequer Chamber, was also present at the argument at your Lordships' bar), admits that he cannot answer them, and his inability to do so has led him to change the opinion which he entertained when in the Exchequer Chamber. We have no reason to believe that the other Judges who joined in that judgment have changed their opinion. We have most sincere deference for their judgment, and as we have had no opportunity of hearing what answer they would have made to the way the case has been put in your Lordships' House, it is with diffidence that we have formed our opinion that they have misapplied the ground of their decision; but entertaining that opinion, we are bound to express it.

We therefore answer your Lordships' second question in the negative.

The answers which we give to the first and second questions put by your Lordships in effect answer the third question. In our opinion the liability to poor-rate is imposed on the Board by the general law,

and not by virtue of the sections of the Act referred to. We therefore answer you Lordships' last question in the negative.

Mr. Justice BYLES.—In answer to your Lordships' first question, I am of opinion that the Mersey trustees are not occupiers within the true meaning of the statute 43 Elizabeth.

No doubt they are occupiers in the strict legal sense of that word; that is to say, they are in possession of the land, and are the proper parties to bring an action of trespass. But the sense in which your Lordships use the word "occupiers," is the sense in which it is used in the earlier leading cases on the subject, and that sense must be borne in mind in order to understand those cases.

I conceive that the occupation, to be an occupation within the statute, must be a beneficial one. The rate is to be raised "*according to the ability of the parish*," and "*by taxation*," both which expressions import, first, that the occupation is to produce profit or pecuniary benefit to the occupier himself, or some one whom he represents, and, secondly, that each assessment is to be in proportion to that benefit. This construction is fortified by the consideration that the statute, when it was passed, authorized an assessment in respect of personal as well as of real property.

Accordingly, such has been the construction of the statute from the earliest times; indeed it may be said that such was the contemporaneous exposition. The date of the statute is 1601. It was stated at your Lordships' bar, that the first edition of Dalton's Justice was published a year or two after that date, and that the author in that edition says, that the overseers are to raise the rate by taxing the occupiers, "*proportioning* them to an annual benefit." I have not had access to the earlier editions of this work, but certainly those words are repeated in the fifth edition published in 1635.

It seems, therefore, plain from the object of the Act, from its words, and from the earliest exposition, that the occupier must, in order to be rateable, enjoy a beneficial occupation.

It is not essential that this occupation should be for the individual benefit of the occupier himself; it may be for the benefit of another: it may be for the benefit of a plurality of other persons, of a considerable number of other persons, or even of a number not certainly defined, but limited by locality or other circumstances. Yet I conceive that if the property be occupied for the benefit, *not* of a number of individuals more or less defined, but for the benefit of the *public at large*, then it is not rateable. This conclusion seems to me to be the result of a long series of authorities.

I do not rely on the exemption of the Crown; for that exemption would take place on the principle that the Crown is not bound by an Act of Parliament, unless named therein. But even this exemption is merely personal, for tenants of the Crown occupying for their private benefit, are rateable.

Whether occupiers for the service of the general government are exempt on the ground that they represent the Crown, may be doubtful. It should rather seem that they are exempt because they occupy for public purposes. Thus the Birmingham post-office was held not rateable, Lord Campbell treating it as clear, but expressing regret "that property taken for public purposes is not rateable:" Smith *v.*

Guardians of Birmingham, 7 E. & B. 483 (E. C. L. R. vol. 90). Upon the same ground an occupation by the Horse Guards (Lord Amherst *v.* Lord Somers, 2 T. R. 372), was held not rateable: Mr. Justice Buller and Mr. Justice Ashhurst laying it down as law, not only that the possessions of the Crown were not rateable, but that the possessions of the *public* were not rateable, and that in the case then before them the plaintiff was exempt, "because he *was like a trustee for the public, deriving no benefit for himself.*"

The exemption is not confined to premises occupied for the purposes of the general government, it extends to occupations for the purposes of local government also. Thus buildings occupied by the local police, "held," say the Court, "for public purposes:" Justices of Lancashire *v.* Stretford, E. B. & E. 230 (E. C. L. R. vol. 94); a shire hall, Hodgson *v.* Local Board of Carlisle, 8 E. & B. 116 (E. C. L. R. vol. 92;) the County Court, The Queen *v.* Manchester, 3 E. & B. 336 (E. C. L. R. vol. 97); a county jail, The Queen *v.* Shepherd, 1 Q. B. 170 (E. C. L. R. vol. 41); reformatory schools supported by voluntary subscriptions, open to several counties, and within the statute 17 & 18 Vict. c. 86, Sheppard *v.* Bradford, 33 Law J. M. C. 182, are all exempt from poor-rates.

The exemption extends to trusts and charities for the benefit of the public at large, though entirely unconnected with government. Public hospitals are exempt. St. Luke's Hospital was held not rateable, on the ground that there was no beneficial occupier: The King *v.* St. Luke's Hospital, 2 Burr. 1053; so was St. Bartholomew's Hospital, 4 Burr. 2435. I conceive that the exemption of hospitals and other charities stands on the ground, not that they are charities, but that they are *public* charities, and that there is no beneficial occupier except the public; and so the Judges in the Queen's Bench held, when they decided that Bethlehem Hospital was not rateable, 10 Q. B. 865 (E. C. L. R. vol. 59); so also they held in a recent case, The Queen *v.* Stapleton, 33 Law J. M. C. 17, 4 Best. & Sm. 629, and the Court of Common Pleas also, in the case of Sheppard *v.* Bradford. Both Courts, in these two cases, draw a distinction between private and public charities, holding the first rateable, and the other not rateable. "The premises," says the Court of Queen's Bench in the first case, "are occupied for the purposes of a highly laudable charity, but one of *a strictly private nature.*" The same distinction was taken by the Court of Queen's Bench in some other cases, particularly The Queen *v.* Licensed Victuallers' Society, 1 Best & Sm. 71 (E. C. L. R. vol. 101), and The Queen *v.* Baptist Missionary Society, 10 Q. B. 884 (E. C. L. R. vol 59).

On the same ground of dedication to public purposes reposes also the exemption of churches and other places of religious worship. Even before the recent statute churches and chapels were exempt from rates, if no profit to individuals was actually made by letting the pews: The King *v.* Woodward, 5 T. R. 79; The King *v.* Agar, 14 East 256. So that it is a mistake to suppose that the exemption of churches and chapels depends merely on the statute of 3 & 4 Will. 4, c. 30. That statute, which applies to church-rates as well as poor-rates, and probably with an original and especial view to the former, extended the then existing exemption, by exempting from rates all

places dedicated exclusively to public religious worship, even when the pews are let, and profit is thus made of the building.

In The King *v.* Mayor of London, 4 T. R. 4–21, where the question arose whether certain trustees of a barge-way and toll-gate should be rated, Mr. Justice Grose says, that "to exempt themselves from the rate, the trustees should have shown that they were *trustees for the public.*" In The King *v.* Salter's Load Sluice, 4 T. R. 730, the property was held not rateable, because all the money collected must be expended for what Lord Kenyon calls the public purposes of the Act.

The history of the property now under your Lordships' consideration, in many ways confirms the position that property occupied for public purposes, is not rateable. From the earliest construction of the Liverpool Docks, in the time of Queen Anne, down to the year 1806, they had never been rated; but in 1806 an attempt was made to rate them. The Sessions quashed the rate; and the Court of Queen's Bench (whether by consent or otherwise does not appear), confirmed the order of Sessions. The attempt, however, was repeated about twenty years after, in 1827; and the case was then fully argued. The statutes were brought before the Court; those statutes directing then as now, that certain burdens should be discharged, and that after their discharge, the rates should be lowered. The Court of Queen's Bench held that there was no beneficial occupation in any person, and confirmed the order of Sessions striking out the assessment: The King *v.* The Inhabitants of Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14).

At the same time, The King *v.* Weaver Navigation, Id. 70 n., was argued and decided in the same manner. "The tolls of the navigation," said Mr. Justice Bayley, "remaining over and above the expense of supporting the navigation, are to be applied to the building and maintaining of bridges and highways. *These are public purposes*, and as no part of the moneys received can be applied to private purposes, those moneys are not rateable in the hands of the trustees."

These cases were followed by The Queen *v.* The Mayor of Liverpool, 9 Ad. & E. 435 (E. C. L. R. 36), in which the law was again held to be clear, that property dedicated to public purposes was not rateable; and the doctrine was applied to the property of the Municipal Corporation of Liverpool situate within the precincts of the borough of Liverpool, because the General Municipal Corporation Act, 5 & 6 W. 4, c. 76, had directed that all the surplus funds of the borough should be appropriated for the public benefit of the inhabitants and the improvement of the borough. In the next year the Court of Queen's Bench decided, on the same grounds, that the property of a municipal corporation was not rateable, though situate *without* the precincts of the borough: The Queen *v.* Exminster, 12 Ad. & E. 2 (E. C. L. R. vol 40). In both these cases all the previous decisions were canvassed and confirmed; the foundation of the judgment in both cases being the acknowledged proposition that property dedicated to public purposes is not rateable. The only question was, whether the benefit of the inhabitants of a particular borough, they being but a section of the public, was a public or a private purpose, and in both cases it was held that the property of a municipal corporation was property dedicated to public purposes, and not rateable.

These decisions caused the statute 4 & 5 Vict. c. 48, to be passed,

the language of which is not only very strong to show that the Legislature itself considered that property dedicated to public purposes was not and is not rateable, but seems to me to create a statutable bar to holding that even property owned and occupied by municipal corporations is rateable in cases beyond the scope of the enacting clause. I forbear to comment minutely on the language of the statute because of the length to which the observations would extend, but almost every line is deserving the attentive consideration of your Lordships. Two observations, however, I must be pardoned for making; first, the statute is not a declaratory, but an enacting statute; secondly, so far from reflecting on the correctness of the then recent decisions, it adopts and affirms them in certain cases, at the end of the proviso to the first section. The statute there continues the exemption from poor-rate in cases where the area of the borough and the area covered by a single poor-rate are co-extensive, because in such a case there is no reason for interfering with the existing law. To put the case in the clearest light; suppose, what has actually happened in some boroughs, and may be the case in many, that the value of the corporate property renders a borough-rate unnecessary; and suppose that there is an entire poor-rate for the borough, which is also not an uncommon case (either because the borough includes but a single parish, or because the management of the poor in the borough is consolidated by a local Act); in such a case I conceive that the municipal property is still by the express words of the statute not only exempt, but exempt not because the statute so enacts, but because it had been exempted by law before the Act passed, and the exemption is recognised and continued.

The language, therefore, of the statute 43 Elizabeth, the whole current of the authorities I have cited to your Lordships, and many others with which I refrain from fatiguing your Lordships, as well as the language of the recent statute 4 & 5 Vict. c. 48, seem to me to show that land occupied for public purposes is not rateable.

On the other side great reliance was placed by the Overseers on the case of The Governors of the Bristol Poor *v.* Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31). But that case seems to me reconcileable with the position that where the general public are the occupiers the property is not rateable, for in that case only some of the public were the occupiers, that is to say, the representatives of the poor of a particular district. Indeed this distinction between the former cases and the case of The Governors of the Bristol Poor *v.* Wait is drawn by the Court of Queen's Bench itself in The Queen *v.* Wallingford Union, 10 Ad. & E. 269 (E. C. L. R. vol. 37). To what extent the property rated is occupied for the public at large is, and always must be, a question of degree, where it is extremely difficult to draw the line, and where it is likely there will be conflicting decisions.

The conflict of the case of The Governors of the Bristol Poor *v.* Wait, if any, is with The Queen *v.* The Mayor of Liverpool, and The Queen *v.* Exminster, where borough property was held not rateable. But even with respect to this apparent conflict, it may be observed, that the occupation was in The Queen *v.* The Mayor of Liverpool, for the benefit of all the inhabitants of a district, and in the case of The Governors of the Bristol Poor *v.* Wait it was only for a portion of

the inhabitants, that is to say, the *poor* of the district. And if your Lordships have to choose between these authorities, I have already called your Lordships' attention to the fact that The Queen v. The Mayor of Liverpool and The Queen v. Exminster are recognised by the Legislature as law, and are continued in some cases as the then existing law, up to this moment by the authority of the statute.

The decision in The Governors of Bristol Poor v. Wait was followed as to the Taunton market in The Queen v. Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), as to the Huddersfield Waterworks in The Queen v. Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66), and as to the Harrogate Waterworks in The Queen v. Harrogate Commissioners, 15 Q. B. 1012 (E. C. L. R. vol. 69).

These cases are all subject to the same observation as the case of Bristol Poor v. Wait. The question was whether the occupation was for the benefit of the public at large, or for the partial benefit of a section of the public. (See the observations of the Court of Queen's Bench in The Queen v. St. George's, Southwark, 10 Q. B. 867 (E. C. L. R. vol. 59).).

The decision in Overseers of Birkenhead v. Trustees of Birkenhead Dock, 2 E. & B. 148 (E. C. L. R. vol. 75), is really no authority on this point, because it proceeded entirely on the ground that there did not then appear to be, as now there is, a statutable obligation to reduce the tolls when their produce should exceed the expenses. It is quite true, however, that the Court, or at least the Lord Chief Justice, did indicate a wish to depart from the authorities as to the rateability of property dedicated to public purposes.

That case was followed by the Tyne Commissioners v. The Overseers of Chirton, which was decided by Lord Campbell and Mr. Justice Crompton, on the ground that the parties benefited were only a particular section of the public, viz., those who used the docks. But Mr. Justice Wightman seems to rest his judgment on the ground that it did not appear that there could not be a surplus revenue; and Mr. Justice Hill, though he assents to the conclusion, does not give his reasons, which for anything that appears, may have been the same as those which influenced Mr. Justice Wightman.

I cannot help thinking that these recent authorities, when the precise point decided in each case, and the ground on which the judgment proceeded are carefully examined, will be found, as authorities, not to be at variance with the position that an occupation clearly and entirely for the benefit of the whole public is not rateable. But, whatever weight may be attributable to some of them, or more properly to the expressions of some Judges, it seems to me very slight compared with the weight which ought to be attributed to the antiquity, number, and consistency of the authorities, which show that overseers cannot usurp the authority of Parliament in taxing the general public.

Then comes the next inquiry. Is the property now under consideration occupied for the benefit of the public at large?

Primâ facie it should seem that it is so, for not only have all the Queen's subjects a right to use the docks at their free will and pleasure, paying their fair contribution to the expenses and nothing more,

but all persons whatsoever, from what quarter of the globe soever they may come.

It is objected first, that the use of the docks is not for all the public, but only for a section of the public, that is to say, for as many of them as have invested their capital in ships or barges or boats.

It might also be said that a navigable river cannot be a public highway, because it is only for those who have invested their capital in ships or barges or boats; or that a public turnpike road, or indeed any public highway, is not a public carriage-way or bridle-way, because, when used as a carriage-way or bridle-way, it is only for those who possess or use carriages or horses.

It is objected farther by the appellants that the encumbrances on the docks have the effect of making them rateable. It is contended as interest and a portion of the principal of the debt are annually paid to the bondholders out of the produce of the tolls, that, to this extent at least there is a beneficial occupation by the board in trust for the bondholders; because it is said that if a tenant from year to year occupied the property and received the tolls without paying the instalments of the principal and the periodical interest of the debt, he would be willing to pay a rent, and that this theoretical rent is the criterion and measure of the rateable value of the occupation.

But I conceive that no tenant could be supposed to receive the tolls without paying the charges. The tolls are appropriated to the payment of the expenses, including charge of construction and repair, and never can by law exceed that limit. As soon as the tolls do exceed it, they are by law to be reduced. If the amount now paid every year to the bondholders, had been actually incurred for construction and repair in that year, it is plain there could be no rent. But the payment made in each year is still but the cost of construction and repair proportioned to that year, and spread over several years, and averaged. If the fact that the expenses have not been incurred within the year created a distinction, then a bricklayer's or mason's bill not paid within the year, but charged on the next or following years, would make the land in those years rateable. It can make no difference that the creditor is not the bricklayer or mason himself, but the assignee of the debt due to the bricklayer or mason.

It is quite true that when land is let to a tenant, the value of the occupation to the occupier is alone considered in estimating its rateable value, and charges on the reversion are not regarded, and are not deducted. But the payments made out of the tolls in discharge of debts and interest in the case now before your Lordships are not charges on a supposed reversion; they represent what are, in ordinary cases, expenses annually incurred to enable the land to command the rent. They are like tithes, or tithe commutation rent-charge, which must be paid by the occupier to prevent the tithe-owner from entering; or, like contributions to a sea-wall, to prevent the land from being overflowed; or like the annual and periodical expenses for repairs; all which are to be deducted in estimating the annual letting and rateable value of property (see 6 & 7 Will. 4, c. 96, and 25 & 26 Vict. c. 103).

It may, indeed, be said that the expenses incurred in permanently improving land, *e. g.*, in building a house on the land, are additions

to and not deductions from the rateable value, though the annual average repairs of that house when built are so. But when a private house is built, the disposable annual income derived from the land is increased, and, therefore, the rateable value of the land is augmented. But in the case before your Lordships the disposable annual income from the docks is not and never can be augmented; for the tolls always must be reduced to such a point as to leave no disposable income.

The objection of the overseers that these charges are to be treated like mortgages or charges on the reversion of ordinary property, and not to be regarded in estimating rateable value, seems inconsistent with itself, for the argument rather tends to show that they are to be regarded, not, indeed, as a deduction, but as causing an addition to the value, and that the docks, when encumbered with debt, are rateable, and, when free from encumbrance, are not rateable.

Again, if these docks are rateable on the ground of the debts and interest owing by them and secured upon them, then it will follow that in the case of turnpike-roads which are involved in debt (at least in those cases where the soil is in the Commissioners, as sometimes happens), the road will be rateable to the poor, because, being involved in debt, the bondholders receive interest.

It is objected, lastly, by the overseers, that there is no substantial distinction between docks made by a joint-stock Company and the docks now under consideration.

But, though no legislative limit is imposed on the tolls, or on the profits of the joint-stock enterprise, still the two cases are widely and obviously different; for, in the case of a joint-stock Company, the land used for the undertaking may produce profit to the Company, and, on that ground, would be clearly rateable. And, even if the limits of profit be fixed by the Legislature by imposing a maximum of tolls, still, in the case of a commercial joint-stock Company, whatever margin of profit is left to the shareholders over and above the ordinary rate of interest on floating capital, confers a rateable value on the land.

On this principle and to this extent it is that a railway or any other joint-stock Company is rateable in respect of its occupation of land. You take the gross income, and deduct expenses, including in the deductions not only interest on the floating capital, but even tenants' profits thereon; and what is left after these deductions is profit to the shareholders, and that profit constitutes the rateable value of the railway. No one ever heard of augmenting the rateable value of a railway or other property by the sum payable as principal or interest on its debentures. What the shareholders receive for their profit derived from the occupation of the land forms the theoretical rent, and, therefore, the rateable value of the land, not what the creditors receive for their debts or interest.

In the Liverpool Docks there are no shareholders, and no profit can ever be received by any one; all that can be done is to keep down interest and pay the debts, neither of which payments constitutes profit to any one. Whatever proportion of the tolls is not wanted for this purpose must, as already observed, be immediately taken off.

However, in a case of this nature, probably authority rather than

general reasoning ought to decide the question. I do not understand your Lordships to ask, and, therefore, it would be officious and presumptuous to express, any opinion on the effect of the precedents cited, in binding your Lordships as the supreme tribunal. But I conceive that a Judge sitting either in one of the superior Courts of law, or even in the Exchequer Chamber, would consider himself concluded by authority in answering your Lordships' first question. And for confirmation I venture to refer your Lordships to Mr. Justice Crompton's language as to the effect of the decisions in pronouncing his judgment in the Court of Exchequer Chamber. He says, "with regard to the former decisions, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case." And, independently of the respect due by our system of law to precedent, a Judge would have to consider some of the consequences which must follow from adopting, at this late period, a new construction of the Statute of Elizabeth.

If a dedication to public purposes can be consistent with rateability, then, for the future, public hospitals, like St. Bartholomew's Hospital, St. George's Hospital, the London Hospital, St. Thomas's Hospital, and other establishments of the like nature in the metropolis and throughout the kingdom, with a multitude of other public charities, become at once subject to poor-rates. Lunatic asylums, like St. Luke's or Bethlehem in the metropolis, and county lunatic asylums, also become assessable at their letting value; though in many instances the exemption of such institutions is recognised by Acts of Parliament, providing that land taken for the purpose shall retain its rateability to the extent of the value of the land without the buildings upon it. Churches and chapels (but for the recent statute) would, even where the pews are not let, have become rateable; for property is to be rated, not at what a tenant does give, but at what he would give for it in its actual condition (6 & 7 Will. 4, c. 96). County jails, county reformatories, county courts, and courts of justice, not only in counties and cities, but in the metropolis also (not indeed in Westminster Hall, because that is one of the Queen's palaces), may become rateable. The property of the Crown in the occupation of the Crown will, no doubt, still be protected from rateability; but old questions now at rest will reappear as to other buildings occupied for public purposes, like the Horse Guards, the Admiralty, many buildings and residences at Portsmouth, Plymouth, Chatham, Milford Haven, and Greenwich, the British Museum, the National Gallery, Greenwich Hospital, the Custom-House, the General Post-Office, burial-grounds, many of the apartments in Somerset House, the premises occupied by the Poor Law Commissioners and other public bodies, public bridges, public turnpike-roads, and the soil of many navigable rivers, if not of public highways themselves. In many of these instances money has been expended and money borrowed on the faith of precedent, the law having been considered as settled by its authorized expounders for so many years.

In the case now before your Lordships, as pointed out by Mr. Justice Hill in the Court of Exchequer Chamber, new docks have been constructed, and large sums of money borrowed on the faith of the decisions in this and other cases.

If the fact that the indebtedness of the trustees and the application of the revenues to the payment of principal and interest makes them liable to be rated, then, as I have already said, I think the principles on which the railways and other joint-stock enterprises throughout the kingdom have hitherto been rated will be unsettled.

In answer to your Lordships' second question, if at the time of the passing of the Acts enumerated in the question, it had been clear on authority and principle that the Liverpool Docks were rateable, then, I think the words contained in the sections referred to would not have exempted them from ratability.

But that is almost an impossible supposition; for, had that been so, such enactments could never have found their way into a succession of statutes. I conceive that these enactments are to be read, like every other written instrument, with reference to the existing and surrounding facts. Those facts are, that from the time of the first establishment of the docks in the reign of Queen Anne, they had never been attempted to be rated, except on two occasions, on both of which occasions they had been pronounced exempt from rates by the Court of Queen's Bench. Those two decisions had been acquiesced in, and acted on for fifty years since the first, and thirty years since the last decision. No one can doubt, I think, that the successive penmen who drew the Acts, and all the parties to them, the board, the corporation, and the several parishes, took it to be clear, first, that an occupation not beneficial was not rateable, and, secondly, that the docks (as distinguished from the warehouses), were not rateable on that ground. The opinion of the draughtsman of itself goes for little or nothing; but that opinion (in the presence of parties interested to dispute it), passed unchallenged five times through both Houses of Parliament. I think that circumstance amounts to a recognition by Parliament of the law, that a beneficial occupation is necessary to rateability, and that the occupation of these docks by the Mersey Board is not beneficial. It will, moreover, be observed that these Acts are not mere private Acts, but public Acts, and not merely public in a technical sense, but upon a matter affecting the general public.

I think farther, that the enactments disclose evidence of a bargain to which was needed and obtained the sanction of Parliament between 1st, the lenders of money; 2d, the trustees and their predecessors in estate; 3d, the parochial authorities of Liverpool; and, 4th, the general public; the effect of which bargain is that a certain portion of the property is to be rateable, and the residue not rateable. And that opinion seems to have been entertained by the Court of Exchequer Chamber.

I may add in conclusion, that the Court of Queen's Bench twice, and the last time after argument before four of the most eminent Judges who ever sat in that Court, had held these docks not rateable. And at this moment there stand the unanimous decisions of the Court of King's Bench in 1827; the unanimous decision of the Court of Common Pleas in 1862; and the unanimous decision of the Court of Exchequer Chamber in Error from the Common Pleas,—to the same effect.

In answer to your Lordships' third question, I am of opinion that

the Act 20 & 21 Vict. c. clxii. (ss. 26, 27), does not impose on the board any liability to poor-rates, which, but for those clauses, would not exist.

The words would seem, primâ facie, to regard charges or liabilities upon *the land*, such as debts, and perhaps easements. It was stated at your Lordships' bar that there are from twenty to twenty-four *charges on the land*, properly so called, and independent of poor-rates, to which the words in that sense would be applicable. But the poor-rate, which, as I have already reminded your Lordships, originally affected personal property in the same way as real property, has repeatedly been held to be no charge on the *land* at all, but only on the *person who occupies*, in respect of the profits of his occupation: Case *v.* Stevens, Fitz. 298; Theed *v.* Starkey, 8 Mod. 314; Earl of Bute *v.* Grindall, 2 H. Bl. 265; Rowls *v.* Gells, Cowp. 453.

Moreover, the poor-rate is a personal charge which exists or does not exist, according to the character of the occupier, as he is or is not a person liable to be rated. Suppose these general words in a grant to the Crown, or in a deed conveying land to trustees of a Court of justice, or of a church, it is plain that they would not impose on the grantee a liability to poor-rate if he were exempt from rates. Or suppose them to exist in a statutable conveyance to the Crown, to which the Crown is a party, *e. g.*, for fortifications; or in a statutable conveyance to any other clearly exempted occupier; I conceive that the words would not impose poor-rates on occupiers not otherwise liable to pay.

Again, the Act of the following year, 21 & 22 Vict. c. 90, s. 8, while incorporating the General Lands Clauses Act, excepts section 133 of that general Act, which excepted section provides for the preservation of the liability to *poor-rates* and land tax in certain cases. But section 5 of the Local Act preserves the land tax, but is silent as to the poor-rate; showing, as I conceive, that the Legislature intended to preserve the land tax, but not the poor-rate.

Lastly, the Act 20 & 21 Vict. is an Act for consolidating the docks at Liverpool and Birkenhead into *one estate*, and vesting the control of them in *one public trust;* and it would be singular if one portion of the property should be rateable, and one not rateable, under precisely similar circumstances. And this observation is strengthened by remembering that where such a distinction exists (as in the case of the warehouses), it is created by express words.

June 22. The LORD CHANCELLOR (Lord WESTBURY).—My Lords, the questions raised in this appeal depend in a great measure on the inquiry, What is the occupation of real property which is liable to be rated under the 1st section of the Act of the 43d Elizabeth, c. 2?

Independently of the decided cases, several of which are irreconcilable with each other, it would seem to be easy to answer this inquiry; and having regard to the Parochial Assessment Act (6 & 7 Will. 4, c. 96), it may be said in answer, that "occupation" to be rateable must be of property yielding or capable of yielding a net annual value, that is to say, a clear rent over and above the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent.

It is in this sense that I understand the words "beneficial occupa-

tion," wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings.

The only occupier exempt from the operation of the Act is the King, because he is not named in the statute, and the direct and immediate servants of the Crown, whose occupation is the occupation of the Crown itself, also come within the exemption. But this ground of exemption does not warrant many decisions which have held that property used for public purposes is not rateable; so also trustees who are in law the tenants or occupiers of valuable property upon trust for charitable purposes, such as hospitals, or lunatic asylums, are, in principle, rateable, notwithstanding that the buildings are actually occupied by paupers who are sick or insane.

If the matter were res integra I could not concur in the decision of Lord Mansfield in the case of St. Luke's Hospital, 2 Burr. 1053, in which he is reported to have said that mere trustees cannot be esteemed occupiers or rated as lessees, or with his conclusion in the case of The King *v.* St. Bartholomew's, 4 Burr. 2435, but with a slight verbal alteration, I entirely agree with the remark of the learned Judges in the present case, that if Lord Mansfield meant that the persons in the legal occupation of valuable property are not rateable, if they occupy in a merely fiduciary character, it is a position which cannot be maintained.

To these observations and decisions of Lord Mansfield, that which appears to me to be the erroneous doctrine of several subsequent decisions is to be attributed.

This is plain on an examination of Lord Kenyon's judgment in the subsequent case of The King *v.* The Commissioners of Salter's Load Sluice, 4 T. R. 730. Lord Kenyon refers to the decision in the case of St. Luke's Hospital, and adopts the position that trustees who have a bare naked trust not coupled with any interest, are not liable to be rated, and he used language which, with the decisions of Lord Mansfield, has introduced the notion that, if valuable property be in the possession of trustees, who are bound to apply the whole of the proceeds to public, but not government purposes, that is in works or purposes for the better accommodation or use of the public, they are not liable to be rated.

There is nothing in the Act of Elizabeth, or in the reason of the thing, to warrant this conclusion. No exemption is thereby given to charity or to public purposes beyond that which is strictly involved in the position that the Crown is not bound by the Act; and it is a remarkable fact, that whenever these opinions of Lord Mansfield and Lord Kenyon have not been presented to the Court of Queen's Bench, the Judges have adopted the correct view of the statute. Thus, in The King *v.* Liverpool, 7 B. & C. 61 (E. C. L. R. vol. 14), decided in the year 1823, and the case of The King *v.* The Trustees of the Weaver Navigation, Id. 70 n., decided in 1827, the Salter's Sluice Case was cited and relied on, and the Court of Queen's Bench adopted the language of Lord Kenyon, and followed his decision. But in the case of The Governors of the Bristol Poor *v.* Wait, 5 Ad. & E. 1 (E. C. L.

R. vol. 31), decided in 1836, the Salter's Load Sluice Case does not appear to have been referred to, and the Court recurred to the correct view of the statute of Elizabeth, and held that the Governors of the Bristol Poor, who had taken some buildings and land on lease for the occupation of their poor, although they were bare trustees, and held for a public purpose only, were such occupiers of property as to be liable to be rated to the poor. This case in its turn has been followed in other decisions as an authority, and it might have been supposed that the authority of the Salter's Load Sluice Case and its two satellites, The King *v.* Liverpool and The King *v.* The Trustees of the Weaver Navigation, had come to an end. But in the year 1839, the Court of Queen's Bench in the case The Queen *v.* The Corporation of Liverpool, 9 Ad. & E. 435 (E. C. L. R. vol. 36), returned to its old allegiance, and again set up the authority of The King *v.* Liverpool and The King *v.* The Weaver Navigation. This last case of The Queen *v.* The Corporation of Liverpool, was decided on the principle that since the Municipal Corporation Act, the property of a municipal corporation is held upon trust for the purposes of the borough fund, and therefore that the corporation of Liverpool was a bare trustee of the property in question, for public purposes. The mischief of this decision was remedied by the Act of 4 & 5 Vict. c. 48, but unfortunately that Act did not declare the law.

Some subsequent decisions of the Court of Queen's Bench have been marked with much timidity. They have in effect departed from the grounds of the decisions in the Salter's Load Sluice Case, and its attendant cases, but have at the same time attempted by very questionable distinctions, to save whole the authority of those cases. Thus in the cases of The Queen *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), The Queen *v.* Longwood, 13 Q. B. 116 (E. C. L. R. vol. 66), there is an attempt to distinguish between the interest of the unlimited public, and the interest of the public limited by the bounds of a county, borough, or parish.

At last in the case of The Tyne Improvement Commissioners *v.* Chirton, 1 E. & E. 516 (E. C. L. R. vol. 102), the Court of Queen's Bench recurred to that, which is in my opinion the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule, that the sovereign is not bound by that statute, and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance), is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.

If this be the true criterion of exemption from rateability where the property is valuable, it is clear that the Mersey Docks are liable to be rated.

In this country many works tending greatly to the convenience and benefit of the public, and in that sense public works, are the results and creation of private enterprise, being made or performed by money subscribed by the public on the terms, or in the hope, of receiving such interest out of the proceeds of the works, as will, in the judg-

ment of the subscribers, make the investment a profitable one. Such is the condition of the Mersey Docks, which are in truth property used and occupied for the profit and benefit of a number of persons, and it is the same thing in substance as if the docks had been demised by the subscribers to the trustees on the terms of maintaining the docks, and paying to the subscribers a rent equivalent to the interest on their bonds.

I am, therefore, clearly of the same opinion with the majority of the learned Judges, that the trustees constituting the "Mersey Docks and Harbour Board" are occupiers of the docks and harbour within the meaning of the word "occupier" in the Act of Elizabeth.

The answer to the second question put to the learned Judges, is in effect a mere consequence of the answer to the first question; for it cannot be pretended that the statute of Elizabeth has been repealed either expressly or impliedly by any of the statutes which apply to the Liverpool Docks, or that the liability of the trustees as occupiers, which is the result of the true interpretation of the Act of Elizabeth, has been discharged or altered by anything contained in the local statutes. On this head it is unnecessary to say more than that I concur with the observations of the majority of the Judges in their elaborate opinion delivered by Mr. Justice Blackburn.

The result is that I humbly move your Lordships to reverse the order of the Court of Exchequer Chamber, in the case of Jones *v.* The Mersey Docks and Harbour Board, but to affirm it in the case of The Mersey Docks and Harbour Board *v.* Cameron.

Lord CRANWORTH.—My Lords, I concur with my noble and learned friend in thinking that judgment ought to be given for the plaintiffs in error.

I have given full attention to the opinions of the learned Judges who assisted us at the hearing, and concurring, as I do, in that delivered by Mr. Justice Blackburn on behalf of himself and four of the other five Judges, I do not feel it necessary to go into the question at length; that very able opinion seems to me to exhaust the subject.

By the statute of Elizabeth the overseers are directed to raise the money necessary for the relief of impotent poor, by taxation, among others, of every occupier of land in the parish.

That the defendants in error are occupiers of land in the parish of Liverpool cannot be doubted; and so, unless there be something to exempt them, they are rateable.

The argument on their behalf has been that, though they are occupiers their occupation is not a beneficial occupation; and the statute, it was contended, contemplated only such an occupation as is beneficial to the occupier or to some other person or persons for whose behoof the occupier is occupying.

If by *beneficial* occupation is meant any occupation of something valuable, something in its own nature *beneficial* to some one, I think it is fair to consider that word as impliedly included in the statute. It was not meant to impose the duty of contributing to the relief of the poor, on any one merely because he might be the occupier of a barren rock, neither yielding, nor capable of yielding, any profit from its occupation.

But I can discover nothing either in the words or in the spirit of

the Act exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him or by any on whose behoof he is occupying, but are to be devoted to the benefit of the public.

In the opinion of the five Judges, delivered by Mr. Justice Blackburn, that learned Judge has traced with great care and accuracy the progress of the decisions on this subject; and I should be merely wasting the time of the House, if I were to proceed to go over again what has been so well done by him. The Court seems to have fallen into error in the time of Lord Kenyon, if not in that of Lord Mansfield, in proceedings which unfortunately were incapable of being questioned in a Court of error. The decisions so made were followed in similar proceedings in the time of Lord Ellenborough and Lord Tenterden; the doctrine on which they rested was shaken in some cases which occurred when Lord Denman was Chief Justice, and eventually were in substance overruled when Lord Campbell presided in the Court of Queen's Bench.

In these circumstances, thinking as I do that there is nothing in the statute of Elizabeth expressly or impliedly exempting from rateability the occupiers of valuable property, merely because the benefit of the occupation is to go to the public, I think your Lordships ought not to consider yourselves fettered by any decisions of the Courts below, but that you ought to lay down the law as you think it ought to have been laid down if this question had arisen before any of those decisions had been pronounced.

I therefore concur in the motion of my noble and learned friend on the woolsack.

To avoid all misconception I wish to add that there are certain cases to which the observations I have made do not apply.

The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes, and property occupied by servants of the Crown, that this mistake has arisen. This principle exempts from rates not only royal palaces but also the offices of the Secretaries of State, the Horse Guards, the Post-Office, and many similar buildings. On the same ground police courts, county courts, and even county buildings occupied as lodgings at the assizes for the Judges have been held exempt. These decisions, however, have all gone on the ground more or less sound, that these might all be treated as buildings occupied by servants of the Crown, and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country. In none of these cases was exemption conceded on the ground contended for in the present case, and I cannot but think that the error which has crept into the decisions has arisen from confusing cases like the present with those in which the interests of the Crown, or the Crown through its servants, were directly concerned.

Lord CHELMSFORD.—My Lords, it is impossible in entering upon the consideration of these appeals, to refrain from an expression of surprise that there should arise at the present day, after more thr

two centuries and a half from the time of the passing of the Act, necessity for interpreting any part of the 43d Elizabeth; and from the numerous cases which have been cited in the argument at your Lordships' bar, it is evident that the exact meaning of the important word "occupier" in the rating clause of that Act, must be regarded as hitherto an unsettled question.

Those who have to establish the liability of the docks to be rated to the poor-rate, have, with respect to the Liverpool Docks, to contend against the authority of a decision probably in 1806, but certainly in 1827, upon the very subject in question in one of the appeals. The latter decision was expressly founded upon a case determined more than 30 years before, and which has since been regarded and acted upon as an unquestionable authority. Under these circumstances the counsel for the parishes might expect that the House would feel the same reluctance to disturb those decisions, as was expressed by Lord Chief Justice Tindal in Crease *v.* Sawle, 2 Q. B. 885 (E. C. L. R. vol. 42), and would say with him, "It would be extremely inconvenient and indeed mischievous to overrule a class of cases which have been much discussed and sanctioned by eminent Judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reasons assigned for their decision; if we could permit ourselves to disregard these authorities on that account, we might feel disposed on the same ground to reject others which have put a construction on the 43d Elizabeth, c. 2, which we were by no means sure it ought to bear, if we were now for the first time called upon to explain the meaning of its language."

Mr. Justice Crompton, in delivering the judgment of the Court of Exchequer Chamber, in the case of The Mersey Docks and Harbour Board *v.* Jones and Others, said, "With reference to the former decisions, I think that neither a Court of co-ordinate jurisdiction nor a Court of error ought to interfere in such a case; if there is any hardship it must be left to the Legislature." By this last observation the learned Judge seems to have considered that this House as well as the Courts of original and appellate jurisdiction ought to yield implicitly to the authority of long-established decisions: but the same reasons for acquiescence do not apply to different tribunals. The Courts rightly abstain from overruling cases which have been long established, because if they did so they would only disturb, without finally settling, the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of stare decisis, refuse to examine the foundation upon which they rest. That would not, in my opinion, have been the duty of your Lordships even if the current of the decisions had been uniform; but as various cases have been decided, which, with all the endeavours to reconcile them, must still be regarded as conflicting and contradictory, it is absolutely necessary to determine what, for the future, shall be considered to be the law with reference to rating docks and works of a similar character.

The 43d Elizabeth, c. 2, enacts "that the overseers are to raise by taxation of every inhabitant, &c., and of every occupier of lands

houses, &c., such competent sums as they shall think fit, according to the ability of the parish," the requisite fund for the purposes of the Act.

The words "to rate in such sum as they shall think fit" do not mean, as Lord Chief Justice Tindal says in Marshall *v.* Pitman, 9 Bing. 601 (E. C. L. R. vol. 23), that they are to have a power to rate arbitrarily, but "to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property;" or as was said in Earby's Case, 2 Bulst. 354, the overseers are to make their taxations and assessments well and truly, and in an equal manner, according to the *visible* estates, real and personal, of the inhabitants within this town.

Primâ facie, therefore, a liability to the rate would seem to attach upon any occupation from which benefit is derived; and no occupier can claim an exemption unless he can find it in the Act itself, or it arises from some principle of law applicable to all cases.

With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation he has no ability in respect of it, and consequently cannot be rateable. The other exemption, which does arise from the Act itself, but which is founded on a general principle of law, applies only to the Crown, which, not being named in the Act, is not bound by it.

I am unable to find any ground of exemption from liability to the poor-rate, either in the Act itself, or in any principle of law apart from the Act, except the two which I have mentioned, and there is nothing to indicate the intention of the Legislature that lands and houses occupied for, what in some of the cases is rather loosely called "public purposes," as contradistinguished from private benefit, should not be liable to the rate.

Lord Campbell, in the case of The Birkenhead Dock Trustees *v.* Birkenhead Overseers, 2 E. & B. 157 (E. C. L. R. vol. 75), says that the exemption on the ground of public purposes takes its origin from the marginal note to the report of the case of The King *v.* Commissioners of Salter's Load Sluice, 4 T. R. 730. If this is so, it is a remarkable fact, that in following that case as an authority, the Courts should have been misled by confining their attention to the marginal abstract, which certainly conveys a very imperfect, if not an inaccurate, idea of the grounds of the decision. The term "public purposes" is only employed by Lord Kenyon in The Salter's Load Sluice Case incidentally. The reason given for the judgment is the absence of beneficial occupation. His Lordship says, "The Commissioners have a bare naked trust, not coupled with any interest." And again, "upon the ground on which the Court proceeded in The King *v.* St. Luke's Hospital, there was no occupier" (by which he must have meant no beneficial occupier, for he adds), "The Commissioners were mere trustees to superintend the execution of the Act, without any personal advantage." This reference to the case of St. Luke's Hospital shows that the leading idea in the mind of the Court was the want of a beneficial occupier, although there does not seem to be a very close analogy between the case of an hospital supported by voluntary subscriptions, from which no person who could be regarded as

an occupier derived any pecuniary benefit, and the receipt of tolls as a compulsory incident to the occupation by the Commissioners of "The Salter's Load Sluice."

The first case in which an occupation for "public purposes" was expressly stated as the ground of exemption from liability to poor-rate is The King *v.* Trustees of the River Weaver Navigation, 7 B. & C. 70 n. (E. C. L. R. vol. 14), to which the principle of the decision in The King *v.* Inhabitants of Liverpool (the decision brought into question by this appeal) was held to be applicable.

In the case of The King *v.* Liverpool, Lord Tenterden proceeds upon the ground of there being no beneficial occupation, with respect to which he said the case of The King *v.* Commissioners of Salter's Load Sluice is decisive. But in The King *v.* Trustees of Weaver Navigation, Mr. Justice Bayley said, "the surplus tolls remaining over and above the expenses of supporting the navigation were to be applied to the repairing and maintaining of bridges and highways. Those were public purposes, and as no part of the moneys received could be applied to private purposes, those moneys were not rateable in the hands of the trustees." In The Queen *v.* The Mayor of Liverpool, 9 Ad. & E. 435 (E. C. L. R. vol. 36), the Judges followed the cases of The King *v.* Liverpool and The King *v.* Weaver Navigation, without expressing any opinion as to the grounds of these decisions, observing, "That they felt it to be impossible substantially to distinguish the case before them from those cases, and especially from the latter, and that if they found the principle settled by decisions already made, they felt it to be their duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences to question or weaken their authority. In the case of The Queen *v.* Exminster, 12 Ad. & E. 2 (E. C. L. R. vol. 40), they adhered to their decision in The Queen *v.* Mayor of Liverpool without any farther explanation of the grounds of their judgment.

But in a more recent case, The Queen *v.* St. George's, Southwark, 10 Q. B. 864 (E. C. L. R. vol. 59), Lord Denman said, "Whether a person is rated as occupier, holder, or possessor of the premises, or as using them, the occupation, holding, possessing, or using them, must be beneficial to the parties so rated. It has been settled by several cases that the possessors, or occupiers as trustees, of property otherwise rateable, the profits of which they were bound by Act of Parliament to apply to public or charitable purposes, were not rateable to the poor in respect of such property." Now, although Lord Denman in the case of The Queen *v.* Mayor, &c., of Liverpool seems to hint at some distinction between the cases of The King *v.* Liverpool and The King *v.* Trustees of Weaver Navigation, yet it would appear (especially from his last-mentioned observations) that he considered them to rest upon the same foundation, and that the counsel on both sides at your Lordships' bar were correct in saying that there was no case decided upon the ground of public purposes which was not resolvable into a beneficial occupation. But if this is so, it will be impossible to accept the explanation by which decisions apparently inconsistent with the judgment in The King *v.* Salter's Load Sluice and the cases which followed it, have been attempted to be reconciled with them.

To these cases it is necessary now to turn. The first of them which broke in upon the series of decisions hitherto considered, is the case of The Governors of the Poor of Bristol *v.* Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31); in deciding this case as they did, the Judges were probably not aware that they were disregarding the authority of previous decisions, as The Salter's Load Sluice Case, and the other cases founded upon it are not noticed in the argument or in the judgment. But in The King *v.* Guardians of the Wallingford Union, 10 Ad. & E. 259 (E. C. L. R. vol. 37), where those cases were cited, the Court followed the case of The Governors of the Poor of Bristol *v.* Wait, without any attempt to reconcile it with what had been previously decided.

In the case of The Queen *v.* Badcock, 6 Q. B. 787 (E. C. L. R. vol. 51), however, Lord Denman in giving judgment reviewed the authorities which appeared to be conflicting; on the one side the series which followed The King *v.* The Inhabitants of Liverpool, and on the other that which commenced with The Governors of the Poor of Bristol *v.* Wait, and observed that in all the first class the public as such, unlimited by the bounds of county, borough, or parish, had a substantial and direct interest in the benefit which the application of the funds produced: in the latter the ratepayers or at most the inhabitants of certain parishes were alone concerned in the benefit, direct or indirect. This distinction was approved of and adopted by Mr. Justice Coleridge in The Queen *v.* Harrogate, 15 Q. B. 1020 (E. C. L. R. vol. 69).

The attempt thus to reconcile the discordant decisions, will be regarded as having been completely unsuccessful when it appears that in the first class, instead of all the cases being instances in which the public at large "unlimited by the bounds of county, borough, or parish," had an interest, we find the case of The King *v.* Trustees of the Weaver Navigation, in which the surplus funds were applied for the general purposes of the county of Chester, and of The King *v.* Mayor of Liverpool, and The Queen *v.* Exminster, in which the public beyond the bounds of the borough had a benefit produced by the application of the funds; and the distinction fails altogether if the term "public purposes," as distinguished from "private purposes," is to be resolved into the question of beneficial occupation, because it would then appear to be immaterial whether the public purposes which exclude the idea of private benefit were of a local or of a general character.

The desire of the Courts however not to be bound by the former decisions, and yet not to be compelled expressly to overrule them, is exhibited in a very striking manner in the case of The Queen *v.* Commissioners of Harrogate, 15 Q. B. 1012 (E. C. L. R. vol. 69), where it was held that in order to exempt property from liability to poor-rate on the ground of its occupation for public purposes, the benefit must be exclusively public, and that if the occupation was in some degree beneficial to the whole public, yielding additional benefit also to a limited district or community, the property was rateable; as if it could make any difference in point of principle, when the occupation is for public purposes, that one portion of the public derives a greater benefit from the application of the funds produced than the rest.

After these fruitless endeavours to reconcile the decisions, a case arose in which it seemed absolutely necessary to determine whether The King *v.* Inhabitants of Liverpool, and the cases which followed it, were to be submitted to as authorities for the future, or were to be set aside and disregarded. In the case of The Trustees of the Birkenhead Docks *v.* The Overseers of Birkenhead, 2 E. & B. 148 (E. C. L. R. vol. 75), the question to be decided was whether the Commissioners of the Birkenhead Docks were liable in respect of their occupation to be rated to the poor-rate; it certainly requires some ingenuity to discover any difference between the Birkenhead Docks and the Liverpool Docks, the latter of which had been decided, in the case of The King *v.* Inhabitants of Liverpool, not to be rateable. But Lord Campbell held that the cases were distinguishable; he said that "the decision in The King *v.* Commissioners of Salter's Load Sluice could be rested only on the clause in the local Act which directed the tolls to be applied and disposed of for the several uses and purposes of the said Act, and to no other use or purpose whatsoever. The question was whether this amounted to a prohibition to apply the tolls to the payment of the poor-rate," and adopting this construction he added, "we think that the decision in the Liverpool Case can only be supported by similar reasoning."

It is clear, however, that the cases in question were not decided on any such ground, and it could have been assumed by Lord Campbell only from his desire to escape from the necessity of submitting to them, by suggesting a distinction without denying their authority. That distinction was that in the Birkenhead Case the obligation to lower the tolls, which was much relied upon in the Liverpool Case, was entirely wanting. It might have been supposed that, the decision of the Birkenhead Case having proceeded upon this ground, when the subsequent case of The Tyne Improvement Commissioners *v.* Overseers of Chirton, 1 E. & E. 516 (E. C. L. R. vol. 102), was brought before Lord Campbell and the Court of Queen's Bench, in which case the local Acts for making a dock expressly required the Commissioners "in the event of any surplus remaining after the appropriation of the rates to the purposes of the Act, to lower the rates to the extent of such surplus," he would have adhered to the distinction, and have held the case to be governed by the authority of The King *v.* Inhabitants of Liverpool; but instead of taking this course, he said that "to hold the dock exempt from rateability they should have to overrule Birkenhead Dock Trustees *v.* Birkenhead Overseers, and that the only distinction between the cases was that in the Birkenhead Case the Commissioners had power to raise the rates again after having reduced them."

In this unsatisfactory state of the authorities it is evident that the two classes of decisions which have been subjected to this examination cannot stand together, and that it is necessary for your Lordships to determine which of them is agreeable to law. It must not be overlooked that in favour of the exemption of the docks from liability to poor-rate, there is the recital in the Act of 4 & 5 Vict. c. 48, which strongly indicates the opinion of the Legislature that the cases which had held the property of municipal corporations not to be liable to poor-rate had been rightly decided. But as Lord Campbell said in

The Queen *v.* Inhabitants of Haughton, 1 E. & B. 501 (E. C. L. R. vol. 72,) "a mere recital in an Act of Parliament, either of fact or of law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital." The question, of course, depends upon the true meaning of the word "occupier" in the 43d Elizabeth.

The words of the Act are as general as possible, "every occupier according to his ability." And Lord Denman in the case of The Governors of the Poor of Bristol *v.* Wait, 5 Ad. & E. 1 (E. C. L. R. vol. 31), seems to give a correct description of the effect of these words, when, after adverting to the meaning of the term "beneficial occupation," he says, "without affecting the precision of an exact definition, it would probably be nearer the truth to say, that a presumptive liability arising from occupation, is to be explained away in each case." It is impossible not to agree with the observations made by his Lordship in the case of The Queen *v.* Sterry, 12 Ad. & E. 92 (E. C. L. R. vol. 40), that "no one can review the numerous decisions (which cases somewhat like the one then before him had occasioned "without regretting that the Court was ever induced to depart from the simple test which the subject-matter of occupation would in every case have afforded; whether the occupation was in respect of private or public or charitable purposes, it would have been wiser to disregard it, and whenever the subject-matter was found productive to any one, to rate the actual occupant in respect of that produce." I cannot help thinking that the test here suggested was the one intended by the Legislature; by the Act, the taxation is to be on every occupier "according to the ability of the parish"; the productive occupation of the several occupiers within the parish make up the aggregate ability. If an occupier derives no benefit of any description from his occupation it forms no part of the general ability of the parish, but if it is productive (although not profitable) there is nothing in the Act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier; as was said by Lord Tenterden in The King *v.* Inhabitants of St. Giles, York, 3 B. & Ad. 579 (E. C. L. R. vol. 23), "If any profit be made, the application of it, when made, is immaterial as to the question of rateability." This seems to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen.

It is to be observed that the term "beneficial occupation" is nowhere to be found in the Act of Elizabeth, and it must have been used in the different cases as synonymous with "ability." In this sense the decisions with regard to St. Luke's and St. Bartholomew's Hospitals, and to chapels and rectory houses, where no pew-rents are received, are perfectly intelligible. In none of them could any person, in the character of occupier, be said to derive any benefit from the occupation. But that the absence of private benefit is no ground of exemption, appears from the cases in which trustees of chapels who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable. And in

the recent case of The Queen *v.* Sterry, 12 Ad. & E. 84 (E. C. L. R. vol. 39), the trustees of a school purchased from the funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12*l.*, although the average annual expense of each was 20*l.*

The case of Salter's Load Sluice gave the key-note to all the subsequent decisions, which held that the primâ facie liability of an occupier no longer existed, when it was shown that the profits connected with his occupation were applicable to public purposes. Lord Kenyon, in founding his judgment upon The King *v.* St. Luke's Hospital, must have intended to decide that in the case before him there was no beneficial occupier, although he did not advert to the distinction that in the case of St. Luke's there was nothing received by any one by reason of the occupation, while the Commissioners of the Salter's Load Sluice were empowered to take tolls for the navigation which was vested in them.

The exemption of an occupier whose occupation is applicable to public purposes, was thus almost incidentally introduced, and having been so, it was accepted without much consideration in the subsequent cases. At last some decisions having taken place which were hard to be reconciled with each other, it became necessary to define, with some precision, the true principle which ought to govern cases of this description. The distinction was then proposed between general and local public purposes. The difficulty, nay, impossibility, of reconciling the cases by a distinction of this sort, is plain. If the ability of the occupier means the personal benefit derived from his occupation, it is as much excluded where the profits of his occupation are applicable to limited public purposes, as where they are to be applied to the benefit of the public at large.

I am of opinion that under the words of the 43d Elizabeth, every occupier of a tenement yielding profit, is within the rating clause of the statute, although the tenement be a public work for the general good of the realm, and the profit be directed to be applied exclusively to its maintenance.

Having thus expressed my opinion that the Mersey trustees are liable to be rated for the Liverpool as well as for the Birkenhead Docks, it is unnecessary to consider the effect of the different Acts by which the trustees were expressly made liable to parochial rates "in respect of warehouses to be built in like manner, as the same are or would be payable in respect of warehouses, but the occupancy of which is beneficial." The provisions of these Acts certainly appear to indicate the opinion of the Legislature, that without them the warehouses would have been exempt from liability to poor-rate as part of the docks enjoying that exemption. But if this liability existed before, the Acts can have no effect in taking it away by mere implication.

It is quite true, as Mr. Justice Byles has said, that the Act of 20 & 21 Vict. having consolidated the docks at Liverpool and Birkenhead into one estate, and vested the control of them in one public trust, it would be singular if one portion of the property should be rateable, and one not rateable under precisely similar circumstances. This

would be so if both the decisions appealed against, were to stand. The remark strikingly exhibits the impossibility of reconciling decisions which on the one hand have exempted the Liverpool Docks from liability to rate, and on the other have rendered the Birkenhead Docks liable to it.

By reversing the judgment in the case of the Liverpool Docks, and by affirming the judgment in that of the Birkenhead Docks, the decisions will at last be brought into uniformity, and the statute 43d Elizabeth will, in my opinion, receive its proper construction, and have its consistent effect and operation.

Lord KINGSDOWN concurred.

Lords' Journals, 22d June, 1865.

AN INDEX

TO

THE PRINCIPAL MATTERS.

(The additional cases in this volume are indexed in [ ].)

ABANDONMENT.

Notice of, where necessary,—see INSURANCE, 3.

ACCOUNT.

Under s. 42 *of the* 14 *&* 15 *Vict. c.* 83,—*see* LETTERS PATENT.

ACKNOWLEDGMENT.

Under 3 *&* 4 *W.* 4, *c.* 74,—*see* HUSBAND AND WIFE.

ADDRESS OF PLAINTIFF.

See PRACTICE, 1.

AIDING AND ABETTING.

What amounts to.

A. and B. were passing in a trap along a highway. A. alighted, and with a dog and gun entered a field where he had no right to go, and there shot a hare, which he brought to the trap and handed to B. Both then departed:—Held, that, upon this state of facts, the justices would be justified in inferring that both were engaged in the commission of a common offence; and that, one having been convicted for trespassing in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, the other might have been convicted under the 11 & 12 Vict. c. 43, s. 5, for aiding and abetting his companion; or that both might have been convicted, upon an information properly framed, of a joint trespass under the former Act. *Stacey*, app., *Whitehurst*, resp., 344

APPROPRIATION.

See CONTRACT, 3.

ARCHITECT.

Agency of.

The mere employment of an architect to prepare plans and a specification for a house, and to procure a builder to erect it, does not render the employer responsible for the accuracy of the bill of quantities furnished by such architect to the builder. *Scrivener* v. *Pask*, 785

ASSURANCE.

See INSURANCE.

ATTACHMENT.

In the Mayor's Court,—see LONDON.

ATTORNEY.

Authority of the Attorney on the Record.

1. An attorney has a general authority to compromise an action on behalf of his client,—provided he act bonâ fide and reasonably, and not in defiance of the direct and positive instructions of the client. *Prestwich* v. *Poley*, 806
2. And this authority, it seems, extends to a managing clerk having the general conduct of the business. *Id.*
3. The plaintiffs employed A., an attorney, to sue B. for the price of a piano-forte sold and delivered. The cause having proceeded as far as the joinder of issue, A. (by his managing clerk), finding B. unable to pay, agreed with him that the plaintiffs should take back the piano-forte, and that the costs should be paid by certain instalments. The plaintiffs on being informed of this arrangement, repudiated it, and A. gave notice of trial:—Held, upon a motion to stay the proceedings on the ground that the action was settled, that this compromise was within the general scope of the authority, and binding as between the plaintiffs and B. *Id.*
4. Whether it would have been competent to the attorney to accept *any other goods* in satisfaction of his client's claim,—*quære?* *Id.*

BANKRUPT.

Deed under s. 192 *of the Bankruptcy Act*, 1861.

1. *Composition-deed.*]—A deed of composition made between "the several persons whose names were subscribed and seals affixed in the schedule (being creditors of T. H. W., of the first part, and T. H. W. of the second part)," recited that the debtor was indebted to the said several persons parties thereto of the first part, in the sums set opposite their respective names, and had agreed to pay a composition of 6*s.* in the pound,—"such payment or composition to be made and paid to all and every the creditors of the said debtor *upon their the said creditors executing this deed*,"—and witnessed, that, in consideration of the payment by the debtor *to the said several creditors* of such composition as aforesaid, the parties of the first part released the debtor:—Held, a void deed, as excluding non-assenting creditors from all benefits under it, notwithstanding all the formalities prescribed by s. 192 of the Bankruptcy Act, 1861, had been duly observed. *Killby* v. *Wright*, 272

2. *Trust-deed. Unreasonable covenants.*]—A stipulation in a trust-deed for the benefit of creditors, under the 192d section of the Bankruptcy Act, 1861, declaring that "it shall be lawful for the trustees to require any person or persons claiming to be a creditor or creditors of the debtor (notwithstanding that he or they may have executed the deed, and that the amount or alleged amount of his or their debt or debts may have been inserted in the schedule thereto) to verify the nature and amount of such debt or claim, with full particulars showing the consideration thereof, by statutory declaration proved before the commissioners of bankruptcy, *or otherwise, as the said trustees or trustees may think fit*,"—is unreasonable, and renders the deed inoperative as against a non-assenting creditor. *Coles* v. *Turner*, 736

3. The defendant, to an action against him as the acceptor of certain bills of exchange, pleaded a composition-deed under s. 192 of the Bankruptcy Act, 1861, by which, reciting that he was indebted *to his creditors* in divers sums of money, and particularly to *the parties of the third part* in the several sums set opposite to their names in the schedule, and, being unable to pay them all in full, had agreed to execute an assignment, he conveyed all his estate and effects to trustees in trust for distribution amongst *all his creditors*. Then came a covenant by *the parties of the third part* not to sue the debtor, and that, if any of them should do so, the debtor should be and he was thereby "acquitted, exonerated, and for ever discharged of and from all actions, suits, *debts, and demands* whatsoever, of the creditor by whom he should be so sued, and those presents might be pleaded in bar thereto as effectually as a release under the hands and seals of the creditors might or could be:"—Held, that, if this clause by force of the Bankruptcy Act applied to non-assenting creditors, it was unreasonable, and, if it did not, there was no release by them, and therefore, in either view, it could not be pleaded in bar to an action by a non-assenting creditor. *Lyne* v. *Wyatt*, 593

Leave to issue Execution against.

4. Where a deed of composition under s. 192 of the Bankruptcy Act, 1861, has been duly registered, but has become unavailing by reason of the failure of the debtor to carry out the arrangement, the application for leave to issue execution against his property or person under s. 198 must be made to the Court of Bankruptcy. *Skilton* v. *Symonds*, 418

Order for Sale under 12 *&* 13 *Vict. c.* 106, *s.* 125.

5. A County Court Judge (sitting as a commissioner in bankruptcy) made an order under the 125th section of the 12 & 13 Vict. c. 106, "that the household goods, furniture, and effects being in or about the messuage or dwelling-house and premises in the occupation of the said T. T. (the bankrupt) in C. Street, M., and known as the Cross Keys, be sold and disposed of by the assignees, for the benefit of the creditors of the said T. T." There was a minute of this order in the court book, which was produced:"—Held, that this order was a valid order, and sufficiently specific. *Fielding* v. *Lee*, 499

BATH TURNPIKE ACT.

See TURNPIKE ACT.

BILL OF EXCHANGE.

Illegality of Consideration.

1. A promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretences, is illegal, and cannot be enforced. *Clubb* v. *Hutson*, 414

Fraudulent Acceptance.

2. To an action by an endorsee against A. and B. as the acceptors of a bill of exchange, B. having suffered judgment by default, A. pleaded that he did not accept the bill. At the trial, it was proved that A. and B. were partners, and that the bill had been accepted by B. in fraud of the partnership articles, without the knowledge of A., and for his own private purposes:—Held, that this cast upon the plaintiff the burthen of showing that he gave value for the bill. *Hogg* v. *Skeen*, 426

3. *Musgrave* v. *Drake*, 5 Q. B. 185, Dav. & Mer. 347, distinguished. *Id.*

Acceptances supra Protest.

4. The acceptor supra protest of a bill of exchange, for the honour of the drawer, is, like the drawer himself, estopped from denying that the bill is a valid bill; and, consequently, it is not competent to him to set up as a defence to an action against him by an endorsee, that the payee is a fictitious person, and that he was ignorant of that fact at the time he accepted the bill. *Phillipe* v. *Im Thurn*, 694

Fictitious Payee.

5. To an action upon a bill of exchange purporting to be drawn by A. payable to the order of B., and to have been endorsed by B. to C., and by C. to the plaintiff,—the defendant (who had accepted the bill for the honour of A.), besides traversing the endorsements by B. and C., pleaded that, when the bill was made, there was no such person as B., the supposed payee, but that his name was merely fictitious, whereof he (the defendant) at the time of his acceptance of the bill had no notice or knowledge.

The Court declined to allow the plaintiff to reply that the names of B. and C. were already on the bill when the defendant accepted it, and consequently that he was estopped from denying that they were real endorsers,—holding that the matter was admissible under the traverse of the endorsement. *Phillips* v. *Im Thurn*, 400

Notice of Dishonour.

6. A count by endorsee against drawer of a bill of exchange, alleging presentment and dishonour, and *due notice thereof* to the defendant, is sustained by proof of a subsequent promise by the defendant to pay, notwithstanding it is proved (or admitted) that due notice of dishonour was *not* given. *Killby* v. *Rochusson*, 357

7. And the Court will, if necessary, amend the declaration, by alleging a waiver of notice. *Id.*

BILL OF LADING.

See CONVERSION.

BILL OF QUANTITIES.

See ARCHITECT.

BURIAL ACT.

Construction of 15 & 16 *Vict. c.* 85.

1. The incumbent of a *district church* to which a burial-ground had been appropriated before the passing of the 15 & 16 Vict. c. 85, and which district had been carved out of a township having separate overseers, and maintaining its own poor, is by the 32d section of that Act entitled to all the fees he formerly enjoyed in respect of burials in his district, for burial services performed by him in a new burial-ground provided by the burial board of a parish or township since that Act. *Day* v. *Peacock*, 702

2. And, where an ecclesiastical district having a burial-ground has been divided into two districts, but no burial-ground has been allotted to the second district, the incumbent of the first created district is entitled to the fees for the burial of inhabitants of both districts. *Id.*

CARRIER.

See TURNPIKE ACT.

CERTIFICATE OF ACKNOWLEDGMENT.

See HUSBAND AND WIFE.

CERTIFICATE OF ARCHITECT, &c.

See CONTRACT, 1.

CHANCERY AMENDMENT AND REGULATION ACTS.

Construction of.

1. It is competent to the Court of Chancery,—notwithstanding the provisions in the Chancery Amendment and Regulation Acts of 1858 and 1862 (21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42),—in refusing an injunction, to reserve to the plaintiff the right of proceeding at law. *Langmead* v. *Maple*, 255

2. To a declaration for an injury to the plaintiff's reversion, by building upon and against certain walls of the plaintiff, the defendant pleaded that the plaintiff ought not to be permitted to implead him in respect of those causes of action, because, after their accrual, and after the passing of the Chancery Regulation Act, 1862, the plaintiff commenced his suit and filed his bill in Chancery against him, and impleaded him therein for the very same rights, claims, and causes of action as in the declaration alleged; and that such proceedings were thereupon had that the Court of Chancery determined the same alleged causes of action in favour of the defendant, and gave judgment and decreed in respect thereof in favour of the defendant; and that the said judgment and decree still remained in force:—Held, a good plea by way of estoppel. *Id.*

3. The plaintiff replied that he ought to be permitted to implead the defendant in respect of the causes of action in the declaration alleged, because he said that the Court of Chancery, in dismissing his bill, reserved to him the right of proceeding at law for the causes of action in the declaration alleged, and ordered his bill to be dismissed, without prejudice to such right:—Held, a good replication. *Id.*

CHARTER-PARTY.

Construction of.

1. *Exception of dangers of the seas, &c.*]—By a charter-party it was agreed that the ship (then at Newcastle), "being tight, staunch, and strong, and every way fitted for *the voyage*," should with all convenient speed "sail and proceed to the usual loading place, guarantied for cargo in all this month (October), or so near thereunto as she might safely get, and there load in the customary manner a full and complete cargo of coal," and, being so loaded, should proceed therewith to Alexandria, and deliver the same on being paid certain freight,—"the act of God, the Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, *rivers*, and navigation of whatever nature and kind soever *during the said voyage* always excepted."

To an action upon this charter-party, alleging for breach that the vessel was not ready to receive, and did not in fact receive the agreed cargo until long after the time stipulated, the defendant pleaded, that, at the time of the making of the charter-party, the vessel, so being at Newcastle, was at a place there far distant from the usual place there for loading to which she was to sail and proceed, and before reaching such usual place would necessarily be exposed to divers dangers of seas, rivers, and navigation,—all which the plaintiffs and defendant at the time well knew; that the voyage in the charter-party mentioned was a voyage from the place at Newcastle at which the vessel was at the time of making it to the said usual place for loading, and from thence to Alexandria; and that the vessel, during the said voyage, that is to say, during such part of the said voyage as took place before she sailed or proceeded from the said usual place on her way to Alexandria, and after she had received on board part of the said cargo, and before any breach of the charter-party, was hindered and prevented by the dangers of seas, rivers, and navigation then happening, from receiving on board and from being ready to receive on board the residue of the said cargo, &c.:—

Held, that the plea was a good answer to the action,—the exception in the charter-party applying as well to the preliminary transit of the vessel to the place of loading as to the subsequent part of the voyage. *Barker* v. *M'Andrew*, 759

2. Held also, that the expression in the charter-party, "*guarantied* for cargo in all this month,"—which was admitted to mean "ready to receive cargo within the month,"—did not take the case out of the exception. *Id.*

CIRENCESTER ROADS ACT.

See TURNPIKE ACT.

COMMON LAW PROCEDURE ACT, 1852.

Section 7. Address of Plaintiff,—*see* PRACTICE, 1.

COMMON LAW PROCEDURE ACT, 1854.

Section 50. Discovery,—*see* PRACTICE, 2.
Section 51. Interrogatories,—*see* PRACTICE, 3.

COMPANY.

See RAILWAY COMPANY.

COMPOSITION-DEED.

Tender or Payment of Composition.

1. The plaintiff declared upon a bill drawn by him in Paris upon and accepted by the defendant.

The defendant pleaded a deed of composition under the Bankruptcy Act, 1861, whereby, in consideration of 5*s.* in the pound to be paid to them by him on the 8th of May, 1863, the creditors released him from their several claims, saving their rights upon securities held by them. The plea contained an averment "that the defendant had always been and still was ready and willing to pay to the plaintiff the said composition or sum of 5*s.* in the pound on the amount of the said sum herein pleaded to, according to the provisions of the said deed of composition," and also an averment, "that, all conditions having been performed, and all things having happened necessary in that behalf, the plaintiff became and was and is bound by the said deed of composition, as if he had been a party thereto, and had duly executed the same."

Replication, that the defendant made default in payment of the composition on the said 8th of May, 1863, and the said composition remained unpaid to the plaintiff for more than fourteen days after that day, and still remained unpaid, and never had been paid or tendered to the plaintiff.

Rejoinder, that the plaintiff was not on and during the said 8th of May, and for the space of fourteen days next after that day, within the realm of England.

Surrejoinder, that the plaintiff was a native of France, and had always resided and carried on his business there, that the contract declared on was made in France, that the plaintiff was not in England at the time of the making of the deed, and that he had not notice of the making thereof at the time of the making or on the said 8th of May, or within fourteen days after that day:—

Held, on demurrer to the plea and surrejoinder respectively, that the absence of an averment of payment or tender of the composition at the time named in the deed, was not cured by the averment of readiness and willingness, notwithstanding the plaintiff's absence from England; and that the general

averment of performance at the end of the plea did not help. *Fessard* v. *Mugnier*, 286

2. Absence of the creditor from England affords an excuse for the want of an averment of tender or payment by the debtor only where the former has gone abroad after the making of the contract. *Id.*

And see BANKRUPT.

COMPROMISE.

Of Action,—see ATTORNEY, 1–4.

CONCURRENT JURISDICTION.

See COSTS, 2.

CONTRACT.

Construction of.

1. By the terms of a contract certain works were to be done for the defendants by the plaintiffs according to certain plans and specifications, and to be paid for by certain instalments "on production by the contractors to the defendants, or one of them, of the certificate of W. L. or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such work to his satisfaction."

In an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs to entitle them to have the certificate of the surveyor that the work had been duly and efficiently performed and completed to his satisfaction, but that the said surveyor had not given such certificate, but *had wrongfully and improperly neglected and refused so to do*, &c.,—Held, on demurrer, that, in the absence of collusion, the plaintiffs were not entitled to recover, without producing the surveyor's certificate, nor were the defendants responsible for the refusal of the surveyor to give one. *Clarke* v. *Watson*, 278

2. A. contracted to sell to B. 500 bales of cotton at a given price, to arrive at L. per ship or ships from C. The contract contained provisions as to quality, and for a reference in case of dispute; and then followed these words,—"*The cotton to be taken from the quay:* customary allowances of tare and draft; and the invoice to be dated from date of delivery of last bale:"—Held, that the stipulation as to the place of delivery was not a condition precedent, but a mere stipulation in favour of the seller, and that the contract amounted in effect to a contract to deliver the cotton at a reasonable time and under reasonable circumstances, the article to be at the buyer's charge from the time of its landing on the quay. *Neill* v. *Whitworth*, 435

Specific Appropriation.

3. A. & Co. contracted with B. & Co. for the purchase of a large quantity of railway sleepers, to be delivered at intervals at the wharf of A. & Co., and to be paid for on delivery. The sleepers arrived at the wharf of B. & Co. in timbers of length sufficient when sawn asunder to make each two sleepers. After several deliveries had taken place, one of the firm of B. & Co. called at the office of A. & Co., and obtained from A. an advance of 600*l.* "*on account of the last cargo of timber,*" *which he represented to be and which then was at the wharf of B. & Co.*, and a portion of which had already been sawn into sleepers:—Held, that this was such a specific appropriation of the timber and sleepers to A. & Co. (who had possessed themselves of them) as to entitle them to retain them as against the assignees of B. & Co., who had become bankrupt after the advance. *Langton* v. *Waring*, 315

Measure of Damages for Breach,—see DAMAGES, 1–3.

And see ARCHITECT.

[CONSTRUCTION.

See WILL.]

CONVERSION.

Measure of Damages.

The plaintiff, a salt-merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice and a draft at four months to De M.

In November, 1863, De M. chartered the ship S. F., belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta,—freight to be paid one-third by freighter's acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the S. F., and had shipped 1007 tons (for which he took the mate's receipts *in his own name*), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate's receipts for the 1007 tons, and demanded a bill of lading for that quantity, *making it deliverable to his order*. This the defendants refused, and the vessel sailed with the salt on board:—

Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the S. F. with the intention of passing the property therein to De M.; and that (the jury having found that the

plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing. *Falk* v. *Fletcher*, 403

And see HUSBAND AND WIFE, 3, 4.

COSTS.

Taxation of.

1. *Subsistence-money.*]—In an action by an engineer against an Indian railway Company, for wrongfully dismissing him from their service without notice, the defendants at the trial consented to a verdict being entered for the plaintiff for 350*l.*, being 200*l.* for a quarter's salary, and 150*l.* for the plaintiff's passage home to England; and, on taxing his costs, the Master allowed the plaintiff (who was a material and necessary witness) subsistence-money during his stay in England waiting for the trial (a year and a half), at the rate of 300*l.* a year, and also 150*l.* for his passage out to India,—it appearing that the Company justified their dismissal of the plaintiff, on the ground of alleged improper conduct, and that the trial had been delayed for twelve months in consequence of the defendant's having obtained a commission for the examination of witnesses at Lahore, the execution of which had been unreasonably delayed; and the plaintiff swearing that he was going back to India, where he had left his wife and family:—Held, that the allowances were not excessive. *Calvert* v. *The Scinde Railway Company*, 306

Concurrent Jurisdiction under County Court Acts.

2. A writ of summons issued against the defendant on the 5th of January, 1865. The *defendant* had two residences, one in London, the other in Kent, more than twenty miles distant from the plaintiff's residence, which was in London. On the 4th of January, the plaintiff's attorney received a letter from the defendant, *dated from his residence in Kent*, referring him to his attorneys in London to accept service of process for him. The defendant's attorneys on the day of the issuing of the writ gave an undertaking to appear: and *on that day one of them had an interview with the defendant at his London residence*:—Held,—on the authority of Butler *v.* Ablewhite, 6 C. B. N. S. 740,—that the result of the facts thus appearing was, that the defendant was residing in Kent at the time of the commencement of the action, and consequently that there was concurrent jurisdiction, and the plaintiff was entitled to his costs, under the 15 & 16 Vict. c. 54, s. 4. *Pigrim* v. *Knatchbull* 798

COTTON FABRIC.

See FACTORY ACTS.

COUNTY COURT.

Concurrent Jurisdiction,—see COSTS, 2.

COVENANT.

Damages in Action for Breach of,—see DAMAGES, 5.

CRINOLINE.

See FACTORY ACTS.

[CROWN.

See POOR-RATE.]

DAMAGES.

Measure of, on Breach of Contract.

1. The defendant contracted to sell to the plaintiff 75 tons of caustic soda,—a commodity not ordinarily procurable in the market,—at a given price, to be delivered on the rails at Liverpool for Hull, 25 tons in June, 25 tons in July, and 25 tons in August; but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered 26 tons in all.

   At the time of entering into the contract, the defendant was aware that the plaintiffs were buying the soda for a foreign correspondent, but did not know until the end of August that it was destined for St. Petersburg.

   The plaintiffs had in fact contracted to sell the soda to A., a merchant at St. Petersburg, at an advanced price; and A. had contracted to sell it to B., a soap-manufacturer at that place, for a still further advance.

   In consequence of the late delivery of the 26 tons, the plaintiffs were compelled to pay a higher rate of freight and insurance. This amounted to 40*l.* 17*s.* For their failure to deliver the remainder to A., they were called upon to pay and actually paid 159*l.*, which A. claimed as the compensation he had been obliged to pay to B. for the failure to perform his sub-contract with him.

   In an action by the plaintiffs to recover from the defendant damages for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the 49 tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to A,—in other words, the loss of profit on the resale. *Borries* v. *Hutchinson*, 445

2. And held, that they were also entitled to recover the 40*l.* 17*s.*, the excess of freight and

insurance, which was the necessary result of the defendant's breach of contract; but that the defendant was not chargeable with the 159*l.* which the plaintiffs had paid to A. to compensate B. for the loss of his bargain,—this being too remote a damage. *Borries* v. *Hutchinson*, 445

3. The plaintiff, a salt-merchant at Liverpool, was in the habit of shipping cargoes of salt there for De M., a merchant in London, on board vessels chartered by De M., charging him a commission in addition to the price, and getting bills of lading making the salt deliverable to his order, which bills of lading he sent with the invoice and a draft at four months to De M.

In November, 1863, De M. chartered the ship S. F., belonging to the defendants, to carry a cargo of salt from Liverpool to Calcutta, — freight to be paid one-third by freighter's acceptance at four months from the sailing of the vessel, the remainder on delivery of the cargo at Calcutta. Pursuant to instructions from De M., the plaintiff proceeded to load the S. F., and had shipped 1007 tons (for which he took the mate's receipts *in his own name*), when he learned that De M. had stopped payment. He thereupon refused to load any more, and the defendants filled up the loading themselves. The plaintiff then produced to the defendants the mate's receipts for the 1007 tons, and demanded a bill of lading for that quantity, *making it deliverable to his order*. This the defendants refused, and the vessel sailed with the salt on board:—

Held, that it was properly left to the jury to say whether or not the plaintiff put the salt on board the S. F. with the intention of passing the property therein to De M.; and that (the jury having found that the plaintiff did not intend to pass the property to De M.) the sailing from Liverpool without giving the plaintiff a bill of lading in exchange for the mate's receipts, as demanded, was a conversion; and that the proper measure of damages was, the value of the salt at Liverpool at the time of sailing. *Falk* v. *Fletcher*, 403

Measure of, in Action for wrongful Seizure of Goods.

4. Goods deposited with a pawnbroker in the way of his trade, are privileged from distress; and this though they may have been pledged more than twelve months. And the proper measure of damages, is, the value of *the goods*, and not merely that of the plaintiff's interest therein. *Swire* v. *Leach*, 479

Measure of, in Action for Breach of a Covenant to repair.

5. The defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, at Christmas, 1863, the premises were dilapidated to an amount fixed by the jury at 22*l.* The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises:—Held, that the plaintiff was notwithstanding entitled to recover substantial damages. *Rawlings* v. *Morgan*, 776

["DEAD WITHOUT ISSUE."

See WILL.]

DILAPIDATIONS.

See DAMAGES, 5.

DISCOVERY.

See PRACTICE, 2.

DISHONOUR.

Waiver of Notice of,—see BILL OF EXCHANGE, 6, 7.

DISTRESS.

See LANDLORD AND TENANT.

[DOCKS.

See POOR-RATE.]

DRAMATIC ENTERTAINMENT.

Within 6 & 7 *Vict.* c. 68.

The following was held to be a dramatic entertainment or "stage-play," within the prohibition of the 6 & 7 Vict. c. 68:—On the rising of the curtain, there was a representation of a storm at sea and of a man swimming, not a living person, but in a theatrical phrase a "double." When the storm subsided, a drop-scene was disclosed, with a lake in the back-ground. A character then appeared upon the stage, in the costume of a Greek prince, who spoke some lines relative to the shipwreck from which he had just escaped. He was then joined by another person, dressed as an attendant, and a short dialogue ensued. These two were the only persons who appeared bodily on the stage; and they were twice on the stage together. There were several other characters, — a king, a princess, &c., and a chorus; and the dialogue between them was a composed set drama, with a regular plot of love, courtship, and matrimony. With the exception of the two persons above mentioned (the dialogue between whom was wholly subordinate to the plot of the piece), none of the characters were at any time bodily upon the stage: they had their places in a chamber below it, where they acted their parts, and addressed each other in the words allotted to them:

but by a combination of lenses and mirrors their figures were reflected upon a mirror at the back of the stage, so as to present to the spectators the appearance of persons actually upon the stage. There was dancing, music, and singing, but no change of scenery or dress during the performance. *Day*, app., *Simpson*, resp., 680

ECCLESIASTICAL DISTRICT.

See BURIAL ACT.

EMBARGO.

See INSURANCE, 1, 2.

ESTOPPEL.

See BILL OF EXCHANGE, 4. CHANCERY AMENDMENT AND REGULATION ACTS.

EVIDENCE.

Declarations by Servants or Agents.

In an action against a railway company for not conveying cattle to market within a reasonable time, a County Court Judge allowed evidence to be given of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and a "night inspector" at one of the Company's stations, whose duty it was to forward the cattle, in which the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them:" —Held, that such evidence was improperly admitted,—it not being within the scope of the man's authority to make admissions as to by-gone transactions. *Great Western Railway Company*, app., *Willis*, resp., 748

EXECUTORS AND ADMINISTRATORS.

Rights of.

1. It is not competent to an executor to maintain an action for a debt which accrued to his testator, and for which he might have sued, more than six years before the issuing of the writ. *Penny* v. *Brice*, 393
2. A. had a right of action against B. for a debt in respect of which the Statute of Limitations began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved the will on the 12th of July, and commenced an action against B. on the 5th of November:—Held,—that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the proceeding *within a reasonable time*. *Id.*

FACTORY ACTS.

What a Manufacture within the 7 & 8 Vict. c. 15, s. 73.

The weaving or plaiting by steam or other mechanical power of cotton thread into a covering for strips of steel to be used for making "crinoline skirts," is a manufacture or a process incidental to the manufacture of a cotton fabric, within the 73d section of the Factory Act, 7 & 8 Vict. c. 15. *Whymper*, app., *Harney*, resp., 243

FENCES.

Defect of,—see TRESPASS.

FOREIGN ATTACHMENT.

See LONDON.

GAME.

Trespass in Pursuit of.

A. and B. were passing in a trap along a highway. A. alighted, and with a dog and gun entered a field where he had no right to go, and there shot a hare, which he brought to the trap and handed to B. Both then departed:—Held, that, upon this state of facts, the justices would be justified in inferring that both were engaged in the commission of a common offence; and that, one having been convicted for trespassing in pursuit of game, under the 1 & 2 W. 4, c. 32, s. 30, the other might have been convicted under the 11 & 12 Vict. c. 43, s. 5, for aiding and abetting his companion; or that both might have been convicted, upon an information properly framed, of a joint trespass under the former Act. *Stacey*, app., *Whitehurst*, resp., 344

GIFT.

A mere parol gift of a chattel, unaccompanied by delivery of possession, passes no property therein. *Bourne* v. *Fosbrooke*, 515

And see HUSBAND AND WIFE, 3, 4.

HUSBAND AND WIFE.

Conveyance by the Wife under 3 & 4 W. 4, c. 74.

1. An acknowledgment by a married woman, under the statute 3 & 4 W. 4, c. 74, was taken in the state of Wisconsin, in the United States of America. The affidavit of verification was sworn before "E. B. Quince, notary public, Dane county, Wisconsin;" and annexed thereto was a certificate, signed by and under the seal of the secretary of state for Wisconsin, that E. B. Quince was a notary public in Dane county, duly appointed, qualified, and empowered by the laws of that state to administer oaths there. The Court allowed the documents to be received and filed, though not strictly in compliance with the rule of Hilary Term, 14 G. 3. *Re Cooper and Tillotson*, 220
2. Where part of the purchase-money is to be paid to the wife, the Court will not allow the certificate of an acknowledgment under the 3 & 4 W. 4, c. 74, to be filed, without an affidavit of the commissioner taking it that

he is satisfied from what passed before him that the lady was content that the money should be paid over to her without any settlement. *Re Mary Dowling*, 223

Gift by the Wife.

3. A wife, though living apart from her husband, cannot lawfully dispose by gift (even accompanied by actual delivery of possession) of chattels acquired by her during the coverture. But, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent to the defendant to set up the title of the husband. *Bourne* v. *Fosbrooke*, 515

4. A., as the executor of B., seized and sold as the goods of his testator a watch and several articles of dress and jewellery which C., the niece of B.'s deceased housekeeper, claimed to be hers by gift, some of them from her aunt, and some from B., in whose house she had for many years lived with her aunt as a sort of adopted member of the family. The jury having found upon sufficient evidence that the articles in question had in fact been given to C., and were in her "possession" at the time of the conversion,—Held, that C. was entitled to recover their value; and that it was not competent to A., who was a mere wrongdoer, to urge, that, as to those articles which came to C. by gift from her aunt, the latter, having a husband living (who, however, made no claim to them), had no authority to dispose of them. *Id.*

HORSE.

See WARRANTY.

INSPECTION OF BOOKS AND DOCUMENTS.

See PRACTICE, 2.

INSURANCE.

Embargo.

1. A policy was effected on a Prussian ship valued at 2500*l.*, against such risks only as were excluded by the clause "warranted free from capture, seizure, and detention, or the consequences of any attempt thereof,"—with a stipulation that the insurers "should pay a total loss thirty days after receipt of official news of capture or embargo, without waiting for condemnation." The ship was detained by an embargo in a Danish port, after the breaking out of hostilities between that power and Germany:—Held, that the right of the assured to claim for *a total loss* became vested on the expiration of the thirty days, notwithstanding that the vessel had never been actually taken out of the possession of the captain, and was afterwards (and after action brought) restored, and arrived in safety in London. *Fowler* v. *The English and Scottish Marine Insurance Company (Limited)*, 818

2. Held also, that the entry of the fact of the embargo in Lloyd's "Loss Book," however the intelligence might have been received, was sufficient to satisfy the term "official news" in the policy. *Id.*

Total Loss.

3. *Necessary sale of a cargo not of a perishable nature.*]—A vessel was stranded and frozen up in the St. Lawrence in the beginning of the Winter; and, on the breaking up of the ice in the Spring, she was found to be in imminent peril, and, after several surveys, both ship and cargo were sold under circumstances which the jury found to constitute a reasonable necessity for an immediate sale,—the expense of getting the ship afloat and repairing her, and of forwarding the cargo (timber) to its destination (Liverpool) being greater than their value when so respectively repaired and carried:—Held, that the underwriters on cargo were liable as for a total loss, without notice of abandonment; the information of the loss and of the sale having both reached the assured at the same time. *Farnsworth* v. *Hyde*, 835

JUS TERTII.

See HUSBAND AND WIFE, 3, 4.

LANDLORD AND TENANT.

Distress for Rent.

Goods privileged,—see PAWNBROKER.

LEASE.

Construction of Mining Lease.

By a mining lease, the lessees covenanted, amongst other things, that they would "from time to time and at all times during the said term work the said pits, mines, and shafts in a workmanlike manner, and *leave pillars of the said stone of sufficient strength to support the roofs of the said mines*, and get and clear the said stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, and at the expiration of the term to fill up the pits and shafts, and restore the surface to a state fit for agricultural purposes:—

Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines,—notwithstanding they might have worked the mines in an usual and a workmanlike manner. *Hodgson* v. *Moulson*, 332

LETTERS PATENT.

Account of Profits, under 15 & 16 Vict. c. 83, s. 42.

In an action for the infringement of a patent, the Court will only direct an account to be taken, under the 42d section of the 15 & 16 Vict. c. 83, of the profits which have been actually made by the defendant, and not of *the loss which the plaintiff has sustained by the infringement:* and, in the case of an assignee of the patent, the account will only be taken from the date of the registration of the assignment under s. 35. *Elwood* v. *Christy*, 494

LEVEL CROSSING.

See RAILWAY COMPANY, 4, 5.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LLOYD'S.

Practice of,—see INSURANCE, 2.

LONDON.

Custom of Foreign Attachment.

1. The custom of foreign attachment in the city of London does not warrant proceedings against one who at the time of their commencement was dead. *Matthey* v. *Wiseman*, 657
2. Held, therefore, that a judgment and execution and payment by the garnishees in a suit so commenced in the Mayor's Court cannot be set up by them as an answer to a claim against them by the personal representative of the deceased, for a debt due to him in his lifetime, notwithstanding that the letters of administration were granted before execution had, and that (as was suggested) by the custom she might have appeared in the Mayor's Court and dissolved the attachment. *Id.*
3. Westoby v. Day, 2 Ellis & B. 605, distinguished. *Id.*

LOSS-BOOK.

See INSURANCE, 2.

MANAGING CLERK.

See ATTORNEY, 2.

MARRIAGE SETTLEMENT.

See PARTNERSHIP, 1.

MASTER AND SERVANT.

Declarations by Servant,—see EVIDENCE.

MATE'S RECEIPT.

See CONVERSION.

MAYOR'S COURT.

See LONDON.

MEMORANDA.

Judges.

Retirement of Williams, J., 219.
Appointment of Montague Smith, J., 219.

Queen's Counsel.

Webster, Milward, Brown, Bulwer, De Gex, Joshua Williams, Smith, Jessel, Sir Thomas Phillips, Giffard, 530.

Serjeant.

Benjamin Coulson Robinson, of the Middle Temple, 530.

MINING LEASE.

See LEASE.

MISDEMEANOR.

Forbearing to prosecute for,—see BILL OF EXCHANGE, 1.

NEGLIGENCE.

See RAILWAY COMPANY.

NOTARIAL SEAL.

See HUSBAND AND WIFE, 1.

NOTICE OF ABANDONMENT.

See INSURANCE.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE, 6, 7.

OATHS.

Administration of,—see HUSBAND AND WIFE, 1

OFFICIAL NEWS.

See INSURANCE, 1, 2.

ORDER AND DISPOSITION.

See BANKRUPT, 5.

PAROCHIAL ASSESSMENT ACT.

See POOR, 1, 2.

PARTNERSHIP.

What constitutes a Partnership quoad Third Persons.

1. S., being about to commence business as an underwriter through the agency of one F., in consideration of the defendant (his father) engaging to hold 5000*l.* available for him for the purpose of carrying out the arrangement, gave him the following memorandum,—"In consideration of your guaranteeing me to the extent of 5000*l.* in my business of an underwriter, until by such business I shall make or acquire from the profits thereof

5000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500*l.*, being equal to 10*l.* per cent. per annum on 5000*l.*; and further, that, if at the end of three years from the date hereof it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years:" the memorandum concluded with these words,—"moreover, in no case are you to be considered as a partner with me in the said business of an underwriter."

By a settlement afterwards made on his marriage, S. assigned to the defendant and one D., as trustees, "all and singular the sums of money, earnings, profits, and emoluments which are now in the hands of F., and all such as shall hereafter come into the hands of F. on account or in respect of the said underwriting business." The deed also contained a power of attorney enabling the trustees to receive the whole proceeds of the business; and the first trust was, to pay the defendant 500*l.* a year, with an additional sum when the profits of the business should have realised a given sum, and a covenant, that, when the accumulated profits should have reached 8500*l.*, and continued at that amount without reduction for two years, the trustees should reassign to S. "the said moneys and *profits* arising from the aforesaid underwriting business:"

Held,—upon a special case, setting out the memorandum and the marriage settlement, and in which it was agreed that the Court should draw "any reasonable inferences of fact,"—that the *deed*, at all events, constituted the defendant a partner in the business, and consequently that he was liable on a policy underwritten by S. *Bullen* v. *Sharp*, 614

Acceptance in fraud of Partnership Articles.

2. To an action by an endorsee against A. and B. as the acceptors of a bill of exchange, B. having suffered judgment by default, A. pleaded that he did not accept the bill. At the trial, it was proved that A. and B. were partners, and that the bill had been accepted by B. in fraud of the partnership articles, without the knowledge of A., and for his own private purposes:—Held, that this cast upon the plaintiff the burthen of showing that he gave value for the bill. *Hogg* v. *Skeen*, 426

3. Musgrave *v.* Drake, 5 Q. B. 185, Dav. & Mer. 347, distinguished. *Id.*

PATENT.

See LETTERS PATENT.

PAWNBROKER.

Pledge not distrainable.

1. Goods deposited with a pawnbroker in the way of his trade, are privileged from distress; and this though they may have been pledged more than twelve months. *Swire* v. *Leach*, 479

2. And, held, that the proper measure of damages was, the value of *the goods*, and not merely that of the plaintiff's interest therein. *Id.*

PAYMENT.

Plea of,—see COMPOSITION-DEED.

PLEADING.

Plea of Estoppel,—see CHANCERY AMENDMENT AND REGULATION ACTS.

Plea of Tender,—see COMPOSITION-DEED.

POOR.

Union Assessment Committee Act.

1. In the parish of S. were certain breweries the occupiers of which were respectively possessed, as owners or lessees, of a number of public-houses known as "tied houses," some of which were in the parish of S. and some in other parishes. These public-houses were let to tenants at smaller rents than they would have been let at if they had been free public-houses, the tenants being bound by contracts with the landlords (assumed to be contained in the instrument of demise) to purchase from them all the malt and other liquors consumed in their respective houses,—and so (probably) paying a higher price for their liquors than they would have paid had they been free.

In valuing these breweries and public-houses for the purpose of making the valuation-list under the Union Assessment Committee Act, 1862, 25 & 26 Vict. c. 103, s. 14, the overseers applied to them the same principles of valuation as to the other rateable hereditaments in the parish, pursuant to the Parochial Assessment Act, 6 & 7 W. 4, c. 96.

The union assessment committee (under the Union Assessment Committee Act, 1862), having ascertained that the overseers, in arriving at the gross estimated rental and rateable value of the breweries, had not taken into their consideration the advantages which the occupiers of such breweries derived from the before-mentioned contracts with their tenants, the publicans, and having obtained the numbers of such "tied public-houses" attached to each brewery, increased the gross estimated rental and the rateable value of such breweries respectively by such an increased sum as the committee in their opinion considered the breweries might reasonably be expected to let for, with the advantages attending the contracts with the "tied

public-houses." They, however, made no reduction in the valuation-list in respect of the value of the several "tied public-houses:"—Held, by Erle, C. J., and Montague Smith, J. (dissentiente Byles, J.), that the union assessment committee had done wrong in so increasing the rateable value of the breweries, such rateable value not being affected by these personal contracts with the tenants of the tied public-houses. *The Overseers of Sunderland-near-the-Sea*, app., *The Guardians of the Sunderland Poor Law Union*, resp., 531

2. Held also, that the "rateable value" of the public-houses was not to be decreased by reason of the burthen cast upon the tenants by their contracts with the brewer landlords. *Id.*

3. In making out the valuation-list in a parish which has adopted the Small Tenements Rating Act, 13 & 14 Vict. c. 99, the reduction to be made under s. 4 of that Act and s. 3 of the 14 & 15 Vict. c. 39, to the owners of small tenements who are rated instead of the occupiers, should be made, not from the "rateable value" of the hereditaments assessed, but from the rate in the pound to be levied and collected. *Id.*

[POOR-RATE.

Exemption from.

1. The Crown not being named in the 43 Eliz. c. 2, is not bound by its enactments. Property therefore in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor. *Mersey Docks* v. *Cameron; Jones* v. *Mersey Docks*, 867

2. The statute is, in its provisions, general and inclusive, and no other principle applying to create an exemption from those provisions, all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, though in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works. *Id.*

3. Trustees who were constituted by Acts of Parliament, "The Mersey Docks Board," and were specially appointed to have the control of certain docks, &c., vested in them as such trustees, in order to maintain these docks for the benefit of the shipping frequenting the port of Liverpool, were therefore held liable to be rated as occupiers, though they occupied such docks, &c., only for the purposes of these Acts and derived no benefit from the occupation. *Id.*

4. The King v. The Commissioners of the Salter's Load Sluice, 4 T. R. 730; and The King v. Liverpool, 7 B. & C. 61, overruled. *Id.*

5. Recent Acts expressly declared that certain warehouses and parts of the docks, then for the first time erected and put under the control of the trustees, were to be liable to rates. Per Lord Chelmsford: These Acts did not by implication declare that the other parts of the docks were not liable to rates. *Id.*]

PRACTICE.

Application for Plaintiff's Address, under s. 7 of the Common Law Procedure Act, 1852.

1. It is no answer to an application for the address of the plaintiff, under the 7th section of the Common Law Procedure Act, 1852, that the defendant makes it for the purpose of enabling him to enforce against the plaintiff an attachment out of the Court of Chancery for non-payment of costs in a suit there. *Cox* v. *Bockett*, 239

Discovery under s. 50 of the Common Law Procedure Act, 1854.

2. Discovery under s. 50 of the Common Law Procedure Act, 1854, refused, in an action against an attorney for alleged negligence and misconduct as attorney for the plaintiff,—the object of the application being to compel the production of the defendants' books, for the purpose of inspecting entries therein upon which it was surmised were founded the items in a certain bill of costs which had been delivered by the defendants to the plaintiff. *Cox* v. *Bockett*, 241

Interrogatories under s. 51.

3. In an action for misrepresentation on the sale of a business. *Blight* v. *Goodliffe*, 757

PRINCIPAL AND AGENT.

Set-off of Debt due to the Agent.

1. One who buys goods of a person whom he knows to be selling them as an agent, cannot set off in an action by the principal for their price a debt due to him from the agent, even though he did not at the time of the purchase know and had not the means of knowing who was the real owner. *Semenza* v. *Brinsley*, 467

2. To an action for goods sold and delivered, the defendants pleaded, that the goods were sold to them by one Moll, then being the agent of the plaintiffs and intrusted by them with the possession of the goods as apparent owner thereof; that Moll sold them in his own name and as his own goods with the consent of the plaintiffs; that the defendants at the time of the sale and delivery did not know and had not the means of knowing that the plaintiffs were the owners of the goods, or that Moll was their agent; and

that, at the time of the said sale and delivery of the goods, and before the defendants knew that the plaintiffs were the owners of the goods, or that Moll was the plaintiffs' agent, Moll became and continued indebted to the defendants for goods sold, &c., to an equal amount, which they were willing and offered to set off:—

Held, a bad plea, for not averring that the defendants did not know and had not the means of knowing that Moll at the time he sold the goods to them was a mere agent. *Semenza* v. *Brinsley*, 467.

Declarations by Agent,—see EVIDENCE.

And see ARCHITECT.

PRODUCTION OF BOOKS.

See PRACTICE, 2.

PROMOTIONS.

See MEMORANDA.

PUBLIC COMPANY.

See RAILWAY COMPANY.

QUANTITIES.

See ARCHITECT.

RAILWAY COMPANY.

Liability of, for Negligence of Servants.

1. *Injury to passenger.*]—On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three feet. In so alighting, a lady, instead of availing herself of the *two* steps, with the assistance of a gentleman jumped from the *first* step to the ground, and sustained a spinal injury from the concussion. The jury having found that the Company were guilty of negligence in not providing reasonable means of alighting, and that the lady had not by misconduct on her part contributed to the injury, and having awarded her 500*l.*,—the Court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages. *Foy* v. *The London, Brighton, and South Coast Railway Company*, 225
2. Where a railway has running powers over the line of another Company,—*Quære*, whether it is not the duty of the former to see that its engines and carriages are reasonably adapted for safe travelling thereon. *Graham* v. *The North Eastern Railway Company*, 229
3. In an action by the guard of a railway exercising such powers, for an injury sustained by him through his head coming in contact with a post on the servient railway, while looking out in the reasonable performance of his duty,—the jury having found that the position of the post was such as to be dangerous to a guard who is to keep a lookout reasonable for the safety of the train:—Held, that the servient railway Company were liable. *Id.*
4. *Level crossing.*]—*Quære*, as to the extent of the obligation of a railway company to place guards at level crossings? *Bilbee* v. *The London, Brighton, and South Coast Railway Company*, 584
5. A railway crossed on a level a public carriage and foot way at a spot which, from the fact of there being a considerable curve in the line, and a bridge near, trains coming in one direction were not seen until very close, was peculiarly dangerous. There were gates across the carriageway which were kept locked; but the footway was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff while using the footway was knocked down by a passing train, and injured:—Held, that it was properly left to the jury to say whether or not the Company had been guilty of negligence. *Id.*

REASONABLE TIME.

See CONTRACT, 2.

RELEASE.

See BANKRUPT, 1, 3.

RETURN TOLL.

See TURNPIKE ACT.

SET-OFF.

See PRINCIPAL AND AGENT, 1.

SMALL TENEMENTS RATING ACT.

Construction of,—see POOR, 3.

[SHIFTING CLAUSE.

See WILL.]

SPECIFIC APPROPRIATION.

See CONTRACT, 3.

STAGE-COACH.

See TURNPIKE ACT.

STAGE-PLAY.

See DRAMATIC ENTERTAINMENT.

[STATUTE OF 43 ELIZ. c. 2.

See POOR-RATE.]

STATUTE OF LIMITATIONS.

Application of.

1. It is not competent to an executor to maintain an action for a debt which accrued to a testator, and for which he might have

sued, more than six years before the issuing of the writ. *Penny* v. *Brice*, 393

2. A. had a right of action against B. for a debt in respect of which the Statute of Limitations began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved the will on the 12th of July, and commenced an action against B. on the 5th of November:—Held,—that the Statute of Limitations was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the proceeding *within a reasonable time*. *Id.*

SURVEYOR.

Certificate of,—see CONTRACT, 1.

TENDER.

Plea of,—see COMPOSITION-DEED.

TIED PUBLIC-HOUSES.

See POOR, 1, 2.

TOLL.

See TURNPIKE ACT.

TRESPASS.

By Cattle through Defect of Fences.

Through defect of fences which it was the defendant's duty to repair, his mare strayed in the night-time from his close into an adjoining field, and so into a field of the plaintiff's in which was a horse. From some unexplained cause, the animals quarrelled, and the result was that the plaintiff's horse received a kick from the defendant's mare, which broke his leg, and he was necessarily killed:—Held, that the defendant was responsible for his mare's trespass, and that the damage was not too remote. *Lee*, app., *Riley*, resp., 722

TRESPASS IN PURSUIT OF GAME.

See GAME.

TURNPIKE ACT.

Construction of Bath and Chippenham Turnpike Act.

1. *Return toll.*]—By a local turnpike Act (10 G. 4, c. cx.), the following tolls were imposed, amongst others,—"1. For every horse drawing any coach, caravan, or other such light carriage (*except stage-coaches*), 4*d*. 2. For every horse drawing any *stage-coach licensed to carry* not more than 16 *passengers*, 5*d*.; and licensed to carry more than 16 passengers, 6½*d*. 3. For every horse drawing any van or other such carriage for the conveyance of goods for hire or pay, 6½*d*. 4. For every horse drawing any caravan or other such carriage (*licensed to carry passengers for hire*), at the same rate as stage-coaches carrying the same number of passengers." And a subsequent clause (s. 7) provided that only one full toll should be taken for passing and repassing on the same day.

A., a carrier, was the owner of a four-wheeled van, in which he journeyed on certain days, and at stated times, between Bath and Chippenham, "carrying goods occasionally, and passengers occasionally, and sometimes both," for payment. He paid the annual duty of 2*l*. 6*s*. 8*d*. imposed by the 16 & 17 Vict. c. 90, sched. D., "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, or merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner that the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue:"—

Held, that A. was not chargeable with return toll, as the proprietor of a "stage-carriage," under the 9th section of the local Act, which provided that "for or in respect of the horses drawing any stage-coach, stage-wagon, van, caravan, cart, or other stage-carriage for the conveyance of *passengers* for payment, hire, or reward, for which toll should have been paid, and which should return on the same day through the same turnpike-gate or bar, the tolls thereby made payable should be paid for every time of passing and repassing through every such gate or bar, in like manner as if no toll had been before paid thereat." *Eatwell*, app., *Richmond*, resp., 364

Construction of Cirencester Turnpike Act.

2. *Return toll.*]—By a local turnpike Act (6 G. 4, c. cxliii.), the following tolls (amongst others) were imposed,—"For every horse or other beast drawing any coach, *stage-coach*, diligence, van, caravan, sociable, berlin, landau, chariot, vis-à-vis, barouche, phaeton, chaise-marine, calash, curricle, chair, gig, whiskey, hearse, litter, chaise, or other such like carriage, 9*d*.: For every horse or other beast drawing any wagon, wain, cart, or other such like carriage, having the felloes of the wheels thereof of the breadth of six inches or upwards at the bottom or soles thereof, 6*d*." And a subsequent clause provided that one toll only should be paid for passing and repassing on the same day.

A., a carrier, was the owner of a covered caravan (the single toll on which was admitted to be 6*d*.) with which he travelled between Cirencester and Cheltenham every Tuesday and Thursday, at a pace not exceeding four miles an hour. He used his caravan principally for carrying *goods, for hire*, but he frequently (as he did upon the occasion in question) conveyed therein also

passengers, for hire. He was not licensed under the Stage-Carriage Act, 2 & 3 W. 4, c. 120, but paid the duty imposed by the 16 & 17 Vict. c. 90, sched. D., "for every carriage used by any common carrier principally and bonâ fide for and in the carrying of goods, wares, and merchandises, whereby he shall seek a livelihood, where such carriage shall be occasionally only used in conveying passengers for hire, and in such manner as the stage-carriage duty, or any composition for the same, shall not be payable under any license by the commissioners of inland revenue:"—

Held, that A. was the proprietor of a "stage-carriage *conveying goods* for pay or reward," within the 11th section of the local Act, which provided that "the tolls thereby made payable for or in respect of horses or beasts drawing any stage-coach, diligence, van, caravan, or stage-wagon, or other stage-carriage conveying passengers or *goods* for pay or reward, shall be payable and paid every time of passing or repassing along the said road;" and therefore liable to the return toll. *Comley*, app., *Carpenter*, resp., 378

UNION ASSESSMENT COMMITTEE ACT.

Construction of,—see POOR, 1, 2.

UNREASONABLE COVENANTS.

See BANKRUPT, 2, 3.

WAIVER OF NOTICE.

See BILL OF EXCHANGE, 6, 7.

WARRANTY.

On the Sale of a Horse.

The defendant, who had a horse for sale at a commission stable, meeting the plaintiff at Tattersall's, and being informed by him that he had been looking at the horse, said,—"He is a good harness horse. He belonged to Baron R., who sold him because he could not match him." The plaintiff went again to the stable, and, after having had the horse put into a break, agreed to purchase him for 65*l*. There was no suggestion that the defendant had intentionally misrepresented the horse: but he turned out to be a kicker. The jury having found that the representation made at Tattersall's was part of the contract, and amounted to a warranty that the horse was quiet in harness,—the Court refused to disturb the verdict. *Percival* v. *Oldacre*, 398

[WILL.

A. so devised his estate of G. that no female issue of any son of B., his first devisee, could take or inherit. B. being himself possessed of another estate of C. H., and having succeeded to the G. estate, made a will by which he devised his original estate C. H. to his sons successively in tail male; then to the children of his sons in tail general; then to his own eldest daughter for life. He added a shifting clause, declaring that his own devised estates should not be held or enjoyed by any one of his sons or daughters, or his, her, or their issue, after such son or daughter, or his, her, or their issue, should have come into possession of the estate devised by A.; but that as often as such estate of A. should come to the possession of any of his (B.'s) sons or daughters, or any of their issue, that then the person next in remainder under the limitations of his (B.'s) will, should be entitled to the C. H. estate; and so from time to time, as often as the event might happen, in such manner and as if the person so becoming possessed of the G. estate had died, or was then dead, without issue:"

Held, that "issue" here only meant those who would take under the limitations anterior to the devise "to the person next in remainder," and excluding them alone from taking under those limitations. The effect of the shifting clause was therefore simply to propel or accelerate the next remainder, but not to carry over the estate in a different class of remainder. *Jellicoe*, app., *Gardiner*, resp., 860]

INDEX

TO

THE REGISTRATION CASES.

ACT OF PARLIAMENT.

Construction of,—see FULHAM BRIDGE.

ACTUAL SEISIN.

See RENT-CHARGE.

AGE.

See QUALIFICATION (BOROUGH), 6.

APPORTIONMENT.

Of Poor-Rate under 17 *G.* 2, *c.* 38, *s.* 12,—*see* POOR-RATE, 3.

ASSISTANT OVERSEER.

See POOR-RATE, 1, 2.

BEDESMEN.

See CHARITABLE FOUNDATION, 2.

BOTTESFORD HOSPITAL.

See CHARITABLE FOUNDATION, 1.

BUILDING.

See QUALIFICATION (BOROUGH), 1–5.

BURLEIGH HOSPITAL.

See CHARITABLE FOUNDATION, 2.

CHARITABLE FOUNDATION.

Bottesford Hospital.

1. In 1692, the Earl of Rutland founded a hospital at Bottesford for fourteen poor men; and by a deed of 1762 the lands belonging thereto were *vested in trustees*, in trust to permit the rectors for the time being of two parishes named to receive the rents and profits, and thereout pay to each of the fourteen inmates certain periodical sums (in the whole amounting to 6*l.* 12*s.* 8*d.* per annum), and to expend upon them certain other sums in clothing, coals, medical and other attendance, &c. Since the year 1778, the trustees had been in the habit of allowing the surplus revenue to be distributed amongst the inmates of the hospital, so that each had down to the present time been in the receipt of 9*s.* 2*d.* per week, exclusive of the allowance for clothing, &c.: but there appeared nothing in the deed of 1762 to warrant this increased allowance:—Held, that the inmates had not any equitable freehold estate or interest in the lands belonging to the hospital, so as to entitle them to be registered for the county. *Steele*, app., *Bosworth*, resp., 22

Burleigh Hospital.

2. Burleigh Hospital, a charitable foundation for a certain number of poor men called bedesmen, was endowed prior to the statute 29 Eliz. c. 5 (an act for the incorporation of public charities), and was governed by certain rules or ordinances which referred to "the feoffees and their heirs," who by lapse of time had been altogether lost sight of. The bedesmen were appointed for life, each on his appointment having a room in the hospital specially assigned to him, and which was found to be of the annual value of 4*l.* The bedesmen were by the ordinances declared to be subject to expulsion for certain offences; but no instance of expulsion had ever been known. There was a warden, who with the bedesmen managed the property belonging to the hospital, letting a portion of it and dividing the rent between them: and, on the occasion of a railway company requiring a portion of the land, the warden and bedesmen executed the conveyance, and received the purchase-money, which they expended in improving the hospital premises for their mutual benefit:—Held,—upon the authority of Simpson, app., Wilkinson, resp., 7 M. & G. 50, 8 Scott N. R. 814, 1 Lutw. Reg. Cas. 168, and distinguishing it from Heart-

ley, app., Banks, resp., 5 C. B. N. S. 40, K. & G. 219, and Freeman, app., Gainsford, resp., 11 C. B. N. S. 68, K. & G. 448,—that each of the bedesmen had an equitable estate of freehold in the room occupied by him, in respect of which he was entitled to be registered for the county. *Roberts*, app., *Percival*, resp., 36

COMPOSITION.

See QUALIFICATION (BOROUGH), 8.

CONSENT.

See PRACTICE, 4.

CONTINGENT LIABILITY.

See POOR-RATE, 3.

COPY.

See NOTICE OF OBJECTION, 2.

DUPLICATE NOTICE.

See NOTICE OF OBJECTION, 2.

EQUITABLE FREEHOLD.

See CHARITABLE FOUNDATION. QUALIFICATION (COUNTY), 3.

FREEHOLD INTEREST.

See PARISH CLERK.

FREEMEN.

By Birth.

1. *Reserved rights.*]—In a borough in which prior to the passing of the Reform Act freemen by birth were entitled to vote on attaining the age of twenty-one, that right is by s. 32 preserved to all the lineal descendants of such freemen. *Gaydon*, app., *Benecraft*, resp., 11

2. Therefore, a freeman by birth, whose *grandfather* was a freeman so entitled previously to the 1st of March, 1831, but whose *father* (being then under age) was not on that day entitled to be admitted a freeman, is entitled to be registered. *Id.*

FULHAM BRIDGE.

Shareholders in.

By a local Act, 12 G. 1, c. 36 (1724), and a subsequent Act of 1 G. 2, c. 18 (1728), commissioners or trustees were incorporated and empowered to treat with the proprietors of an ancient ferry between Fulham and Putney for the purchase of their rights, and to procure persons to subscribe capital for the building of a bridge between those two places, and to convey to those persons in perpetuity *the surplus tolls or income of the bridge and ferry after providing for the expenses of repairs*, &c. The commissioners having agreed with thirty individuals who each subscribed 1000*l.* for the building of the bridge, and having compensated the proprietors of the ferry, in 1729, by a deed, reciting several of the provisions of the two Acts above mentioned, and that the thirty individuals had paid the sums subscribed by them, and built the bridge, assigned to trustees, in trust for those persons, their heirs and assigns for ever, the said bridge and all the materials whereof the same was erected and built, and all tolls, revenues, profits, and incomes of the said bridge, *with all such ground and soil adjacent and belonging to the ferries as had been, was, or should be vested in the said commissioners*, &c.:—Held, that the commissioners had no authority under their Acts of Parliament to convey to or in trust for the subscribers or shareholders in the bridge any lands vested in them by those Acts; that the latter, having notice of the powers which the commissioners had, took under the deed of 1729 nothing more than the commissioners could lawfully convey; and that consequently they had not such an interest in the land on either side of the bridge as to entitle them to be registered for the county. *Tepper*, app., *Nichols*, resp., 121

GAOL.

See QUALIFICATION (BOROUGH), 7.

HOSPITAL.

See CHARITABLE FOUNDATION.

JOINT OCCUPATION.

See QUALIFICATION (COUNTY), 1.

LINEAL DESCENDANTS.

See FREEMEN.

LIST OF VOTERS.

Reference to, in Notice of Objection.

The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens and overseers, and distinct places of worship; and separate lists of voters are stuck up at the several places of worship by the respective churchwardens and overseers of each parish or township:—Held, that the objector sufficiently described himself in his notice of objection by stating that he was "on the list of voters for the borough of Devonport *and township of East Stonehouse.*" *Oram*, app., *Cole*, resp., 1

LOCAL ACT.

Construction of,—see FULHAM BRIDGE.

MARKET GARDENER.

See QUALIFICATION (BOROUGH), 1–3.

MUSIC HALL.

See QUALIFICATION (COUNTY), 3.

NOTICE OF OBJECTION.

Description of Objector.

1. The borough of Devonport consists of the parish of Stoke Damerel and the parish or township of East Stonehouse. Each of these parishes has distinct churchwardens and overseers, and distinct places of worship; and separate lists of voters are stuck up at the several places of worship by the respective churchwardens and overseers of each parish or township:—Held, that the objector sufficiently described himself in his notice of objection by stating that he was "on the list of voters for the borough of Devonport *and township of East Stonehouse.*" *Oram*, app., *Cole*, resp., 1

Service by Post.

2. *Copy.*]—The duplicate notice of objection, stamped by the postmaster pursuant to the 100th section of the 6 & 7 Vict. c. 18, produced before the revising barrister, had written at the top of it the word "Copy:"—Held, that (assuming that the word "Copy" was not on the notice transmitted by the postmaster to the person objected to) the notice was well served. *Benesh*, app., *Booth*, resp., 111

OBJECTION.

Notice of,—see NOTICE OF OBJECTION.

OFFICE.

See PARISH CLERK.

OVERSEER.

See POOR-RATE, 1, 2.

PAPER-BOOKS.

Delivery of,—see p. 111 (*a*).

PARISH CLERK.

Appointment and Rights of.

1. The appointment of a parish clerk need not be by deed. *Roberts*, app., *Drewitt*, resp., 48
2. A parish clerk by virtue of his appointment was entitled to a twelfth share of twenty-six acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as he continued clerk, and his predecessors in the office had always enjoyed the same:—Held, that the clerk had a freehold interest in his share, in respect of which he was entitled to be registered. *Id.*

PIG-STYE.

See QUALIFICATION (BOROUGH), 3.

POOR-RATE.

Validity of.

1. *Quære*, whether a poor-rate, one of the persons necessarily constituting the majority in the making of which was an *assistant overseer*, is valid? *Baker*, app., *Locke*, resp., 5

Payment of.

2. In the parish of T. there were two church wardens and four overseers, and an assistant overseer who was appointed "to assist the overseers of the poor of the said parish in the performance of all the duties incident to the office of overseer of the said parish, except the collection of rates." A rate was made by the two churchwardens, one overseer, and the assistant overseer, and was allowed by two justices, and duly published and not appealed against:—Held, that, the rate being apparently good upon the face of it, the non-payment of it disqualified a party from being placed upon the borough list of voters. *Id.*

And see QUALIFICATION (BOROUGH), 8, 9.

PRACTICE.

Jurisdiction of the Revising Barrister.

1. Two barristers, A. and B., were appointed to revise the lists of voters for a county. At a Court held by A., the name of C. was, upon objection, expunged from the list on which it appeared, C. not being present to support his right, and A. duly initialed the erasure, and signed the list as settled by him. At a Court held by B. on the following day, C. attended and satisfied B. that his absence on the preceding day was excusable; whereupon B. consented to rehear the matter (though his power to do so was contested), and ultimately restored C.'s name to the list:—Held,—it not appearing that the objector was present on the second occasion *with the proofs necessary to sustain his objection*,—that the course taken by B. was not justifiable. *Blain*, app., *The Overseers of Pilkington*, resp., 6
2. Whether B. could under any circumstances lawfully reopen the decision of his colleague, *Quære?* *Id.*
3. Although the decisions of the Court of Common Pleas upon cases stated by the revising barristers under the 6 & 7 Vict. c. 18 are by the 66th section of that statute declared to be "final and conclusive in the case upon the point of law adjudicated upon," it is nevertheless competent to the revising barrister upon a future occasion, and between other parties, again to raise the question, even in relation to the same property qualification. *Roberts*, app., *Percival*, resp., 36

Bringing up and hearing Appeals.

4. The Court cannot entertain an appeal against a decision of a revising barrister unless the requirements of the 42d section of the 6 & 7 Vict. c. 18 have been duly complied with, or there be a clear and unequivocal consent to waive the performance of them. *Scott*, app., *Durant*, resp., 205

PRISON.

See QUALIFICATION (BOROUGH), 7.

PUTNEY BRIDGE.

See FULHAM BRIDGE.

QUALIFICATION (COUNTY).

As Tenant.

1. *Joint occupiers.*]—A. occupied solely as tenant a house and land at a yearly rent of 40*l.* He also jointly with his father rented and occupied other lands at a yearly rent of 64*l.* Both occupations were under the same landlord:—Held, that A.'s proportion of the joint rent could not be added to his separate rent, so as to constitute a qualification to vote for the county under the 2 W. 4, c. 45, s. 20. *Smith*, app., *Foreman*, resp., 144

Joint Occupation of Land.

2. A. occupied solely as tenant a house and land at a yearly rent of 40*l.* He also jointly with his father rented and occupied other lands at a yearly rent of 64*l.* Both occupations were under the same landlord:—Held, that A.'s proportion of the joint rent could not be added to his separate rent, so as to constitute a qualification to vote for the county, under the 2 W. 4, c. 45, s. 20. *Smith*, app., *Foreman*, resp., 144

Shares in a Public Company.

3. The proprietors of a Music Hall, possessed of real estate, by deed vested the same in trustees, who were to deal with and manage it for the general body of shareholders, who were to have an interest in the net profits in proportion to the amount of their respective shares:—Held, upon the authority of Bennett, app., Blain, resp., 15 C. B. N. S. 518, that such shareholders had not any equitable interest in the realty, so as to entitle them to be registered for the county. *Freeman*, app., *Gainsford*, resp., 185

QUALIFICATION (BOROUGH).

What a "Building" within s. 27 of the Reform Act.

1. *Description.*]—The tenant of land in a borough erected thereon at his own expense a wooden structure with boarded sides and a thatched roof, and supported by wooden posts let into the ground, and used the same for storing potatoes and other things connected with his business of a market-gardener. The revising barrister having found the thing so described to be a "building" within the 27th section of the Reform Act,—Held, that there was not sufficient in the description which he had given to authorise the Court to reverse his decision. *Powell*, app., *Farmer*, resp., 168

2. And, the revising barrister having found that this building was occupied by the party "as tenant,"—the Court (acting on the general presumption that things affixed to the freehold pass to the landlord) held that they could not see sufficient on his statement to authorise them to reverse his decision. *Id.*

3. *Pig-stye.*]—The tenant had erected in like manner on the land a pig-stye, with a slated roof, but in other respects similar to the structure before mentioned:—*Semble*, that this was not a "building" within the Act. *Id.*

4. The respondent occupied a farm of which a few acres, worth more than 10*l.* a year, were within a borough, but with no building thereon. An electioneering agent, for the purpose of creating a vote, erected on this land a shed, made of wood, having four boarded sides and a boarded roof, and being supported by four posts let into the ground three feet. The revising barrister having held that this was a "building" within the 27th section of the Reform Act, and that it was occupied by the respondent as "tenant,"—the Court (acting upon the rule laid down in Cook, app., Humber, resp., 11 C. B. N. S. 33 (E. C. L. R. vol. 103), K. & G. 413) reversed his decision. *Powell*, app., *Boraston*, resp., 175

5. Remarks upon Watson, app., Cotton, resp., 5 C. B. 51 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 53. *Id.*

Occupation as Tenant.

6. *Full age.*]—To entitle a party to be registered under the 2 W. 4, c. 45, s. 27, in respect of the occupation of a house, &c., it is not necessary that he should have been of "full age" during the whole of the prescribed period of occupation. *Powell*, app., *Bradley*, resp., 65

Six Months' Residence.

7. A man has not "resided" in the borough "for six calendar months next previous to the last day of July," within the 27th section of the 2 W. 4, c. 45, when he has for a portion of that time been detained in a gaol situate more than seven miles distant therefrom, under a sentence of imprisonment for an assault, without the option of paying a fine. *Powell*, app., *Guest*, resp., 72

Payment of Rates.

8. A. was possessed of three houses (one of which he himself occupied), each being under the yearly value of 10*l.* Under a local Act, he compounded for the rates upon all

the premises for one year. At the expiration of the year no new composition was entered into, but the overseers continued to assess the premises as before, though A. had improved those in his own occupation so as to increase their yearly value to upwards of 10*l*. He then claimed to be rated to the full rate in respect of the premises in his own occupation, but he did not at that time pay or tender the arrears of rates then due. No alteration was made in the rating. A. afterwards, and before the 20th of July, paid to the overseers a sum which was more than sufficient to satisfy all rates due in respect of the last-mentioned premises to the 5th of January, but made no specific appropriation of the money at the time of the payment; and the overseers placed the amount against *all* the rates due:—The revising barrister having found that A. was sufficiently rated, and that he had paid his rates so as to entitle him to be registered,—the Court refused to interfere with his decision. *Powell*, app., *Jones*, resp., 83

9. A. came into occupation of the qualifying premises in August. A poor-rate had been made in the preceding April, and another was made in September following. A. had paid the last-mentioned rate; but no demand had been made upon him for (nor had he paid or tendered) his proportion of the April rate, under the 17 G. 2, c. 38, s. 12, although it had not been paid by the outgoing tenant, whose name appeared upon that rate:—Held by Erle, C. J., Willes, J., and Keating, J.,—dissentiente Williams, J.,—that A. had paid "all the poor-rates *which had become payable from him* in respect of the premises," within the meaning of the 2 W. 4, c. 45, s. 27,—the liability to pay the proportion of the April rate being only a liability subject to the contingency of the outgoing tenant having made default, and of the overseers demanding his proportion of the rate from A. *Flatcher*, app., *Boodle*, resp., 152

RENT-CHARGE.

Under the Statute of Uses.

1. *Actual seisin.*]—Where a rent-charge is created by means of a conveyance to uses, the grantee immediately acquires "actual seisin," by the words of the statute 27 H. 8, c. 10, s. 1, and is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent. *Heelis*, app., *Blain*, resp., 90
2. *Aliter*, where the rent-charge is created by an ordinary grant at common law, as in Murray, app., Thorniley, resp., 2 C. B. 217, 1 Lutw. Reg. Cas. 496, and Hayden, app., The Overseers of Twerton, resp., 4 C. B. 1, 1 Lutw. Reg. Cas. 510. *Id.*

RESERVED RIGHTS.

Freemen by Birth.

1. In a borough in which prior to the passing of the Reform Act freemen by birth were entitled to vote on attaining the age of twenty-one, that right is by s. 32 preserved to all the lineal descendants of such freemen. *Gaydon*, app., *Bencraft*, resp., 11
2. Therefore, a freeman by birth, whose *grandfather* was a freeman so entitled previously to the 1st of March, 1831, but whose *father* (being then under age) was not on that day entitled to be admitted a freeman, is entitled to be registered. *Id.*

RESIDENCE.

See QUALIFICATION (BOROUGH), 7.

SEISIN.

Under the Statute of Uses,—see RENT-CHARGE.

SERVICE OF NOTICE.

See NOTICE OF OBJECTION, 2.

SERVICE BY POST.

See NOTICE OF OBJECTION, 2.

SHAREHOLDERS.

See FULHAM BRIDGE. QUALIFICATION (COUNTY), 3.

SHED.

See QUALIFICATION (BOROUGH), 1, 5.

STATUTE OF USES.

See RENT-CHARGE.

TENANT.

See QUALIFICATION (BOROUGH), 6, 7.

TOLLS.

See FULHAM BRIDGE.

TRUSTEES.

See QUALIFICATION (COUNTY), 3.

USES, STATUTE OF

See RENT-CHARGE.

WAIVER.

Of formal Requirements of the Statute.

The Court cannot entertain an appeal against a decision of a revising barrister unless the requirements of the 42d section of the Registration Act, 6 & 7 Vict. c. 18, have been duly complied with, or there be a clear and unequivocal consent to waive the performance of them. *Scott*, app., *Durant*, resp., 205

Stanford Law Library

3 6105 062 775 213